ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, OCTOBER 29, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman) and Lenroot.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER—Resumed.

Gen. CROWDER. Yesterday I was referring to a charge that my attitude toward the bill to amend section 1199 of the Revised Statutes so as to confer appellate power upon the President respecting findings and sentences of courts-martial, was one of practical abandonment of that legislation. I referred to my efforts to secure that legislation and to my appointment as liaison officer between the department and the committees of Congress to expedite the war legislation, and said that in the course of that work I had prepared a calendar of unfinished business pending before the two Committees on Military Affairs. At the moment I could not lay my hands upon it. I knew that I had brought the document here. It was a document that was printed by Congress, and was used by the committees, and I would like to direct your attention to it. I have the original here. You see in this first part all of the House bills that the War Department was interested in, with these columns showing the progress of each bill toward enactment.

Senator LENROOT. I see.

Gen. CROWDER. Here end the House bills, and the Senate bills are in this part of it, and you will find the progress of each bill in the Senate noted in detail. Here is what appears with respect to the amendment of section 1199, Revised Statutes, "Increasing the revisory powers of the Judge Advocate General and the President." This is simply evidence on the question of whether or not my attitude was one of abandonment of this legislation.

Yesterday Senator Lenroot made some inquiries respecting the effect of the disapproval of findings and sentences of courts-martial by the reviewing authority, and I answered that the effect of disapproval was an acquittal. In order to put the matter beyond any question, I examined the records of the office, with this result:

1. Disapproval of a sentence of a court-martial by the reviewing authority is equivalent to an acquittal of the accused by the court. The following authorities are cited in support of this proposition:

Held, that disapproval of a finding of guilty has the effect of an acquittal. (C 2195, Apr. 4, 1896; 12168, Mar. 10, 1902; 12375, Apr. 23, 1902. Dig. Ops. J. A. G., 1912 Discp. XIV E 9 b (1) (a), p. 564.)

A disapproval of the proceedings of a court-martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act putting an end to such proceedings in the particular case and rendering them entirely nugatory and inoperative: * * *.

The effect of the entire disapproval of a conviction or sentence is not merely to annul the same as such, but also to prevent the accruing of any disability, forfeiture, etc., which would have been incidental upon an approval. (Davis, Treatise on the Mil. Law of the U. S., pp. 201, 202.)

Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory; * * *. Upon such a disapproval also the accused is restored *ex vi* to his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which he may have been subjected, and to be returned to the duties and rights of his rank and office; his legal rights and privileges remaining no more affected than if the trial has resulted in an acquittal. (Winthrop, Mil. Law and Prec., 2d ed., Vol. I, p. 690.)

The uniform practice of the Government seems to have been to regard such action (disapproval of a sentence) by the reviewing officer as tantamount to an acquittal by the court itself, and it can not be doubted that such is the effect of the order of the reviewing authority in this case. (13 Ops. Atty. Gen., 459, 460.)

I thought I would like to introduce that.

Senator LENROOT. Yes, we are very glad to have that.

Gen. CROWDER. I think this is an appropriate time to state the view of the committee of the American Bar Association upon this question of a military court of appeals, and first I would like to state how that committee came to be appointed.

On January 4, 1919, there appeared in the Associated Press dispatches, published widely, a statement by Judge Page, the president of the American Bar Association, following a meeting of the executive committee of that association, that the present military code was archaic, unworthy of the name of law, and Judge Page announced his intention to investigate through a committee appointed by himself. I brought that matter to the attention of the Secretary of War, and told him that I was under an engagement to proceed to Chicago, and address the selective-service boards of that city and of northern Illinois, and also to address the Chicago Bar Association on the following day at luncheon; that probably I would meet Judge Page, and that I wanted his authority to say to Judge Page that the department would welcome the appointment of such a committee, not that I felt very much assured by the circumstance that Judge Page had pronounced a verdict before he had investigated, but because I knew that any committee appointed by him would have to report back to the full bar association; and I had confidence in the judgment of the American Bar Association upon every question that was vital to the issues that had been raised.

I proceeded to Chicago, but I did not meet Judge Page. Later, my recollection is, the Secretary of War addressed to him a letter and asked him to proceed with his investigation, and that in pursuance of that letter Judge Page came to Washington. It is certain that he visited Washington, and called at my office, and we had some discussion about the work that would devolve upon the committee. I did venture to suggest to him the composition of an investigating committee, to this extent, and to this extent only: I said to him in effect that we have six living ex-Secretaries of War, all of them distinguished members of the American Bar Association; three of them Republicans, Mr. Root, Mr. Taft, and Mr. Stimson, and three of them Democrats, Mr. Wright, Mr. Dickinson, and Mr. Garrison; that all of them had an intimate knowledge of the Articles of War, derived from executing the military code in the graver cases that come before

the President for his confirming action, and that it seemed to me that one of the six might well be appointed upon the committee, probably as chairman. He made no reply to my suggestion, and afterwards when the committee was appointed, I was a little surprised that this suggestion had not met with favor. I happened to be in New York City when the announcement was made of the personnel of the investigating committee, and I met a gentleman whose name I do not now recall, but who lives in Albany and who has for a long time been secretary of the New York State Bar Association. He told me that he had cooperated with Judge Page in the selection of the committee. I expressed to him my disappointment that one of the ex-Secretaries of War had not been named on the committee, and I shall always remember his reply. It was, in effect, that "We did not want any one of them;" that they were all tarred with the same stick as Army officers.

Beyond that suggestion I took no interest in the personnel of that committee, and I do not know of any other suggestion that was ever made to Judge Page about who should serve on that committee. I was a little surprised when the committee was announced to find out that Judge Page had gone to the State of North Carolina, from whence Gen. Ansell comes, to select one of the members. I certainly should have been embarrassed if he had gone to the State of Missouri, my native State, and selected a member of the bar of that State to act upon that committee.

Senator WARREN. Do you think the Secretary of War suggested any of the names?

Gen. CROWDER. I have talked to the Secretary of War many times on the subject, and I have no reason to believe that he ever made a suggestion as to the personnel of that committee.

Now, I think we must all be coming to the conclusion that the great question which is to be settled here, the question as to which all others are subordinate, is the question of appellate review, and where that appellate power shall be vested. I have studied carefully the report of the bar committee. Referring to Gen. Ansell's brief of November 10, 1917, deducing appellate power in the Judge Advocate General from section 1199, Revised Statutes, and my opposing brief of November 27, 1917, the committee unanimously reported:

> It may hardly be necessary for the committee to express an opinion upon this question; yet we are inclined to think, in view of the custom of the Judge Advocate General for many years and the only Federal decision on the subject, the case of Mason in the Circuit Court of the Northern Division of New York, decided by Judges Wallace and Cox, that it would be rather difficult to establish as a matter of law that the use of the word "revise" in section 1199, conferred such an extensive authority as is now asserted by some. (P. 20, A. B. A. Rept.)

In other words, the committee unanimously reported their nonconcurrence with Gen. Ansell's contention.

Passing to the consideration of the legislation that should be had to secure adequate appellate review, the following views are expressed:

1. Views of the majority (Bruce, Hinkley, Conboy). The majority quotes with approval the following recommendation of Judge Advocate General Crowder in his letter of March 10, 1919, to the Secretary of War:

> Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War, January 19, 1918, which covers the ground more completely and more flexibly

than the now pending bills—referring to the bill introduced by Senator Chamberlain last winter (S. 5320), among others—and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar, February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact." This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters—the Judge Advocate General.

The majority add the following explanatory comments:

We believe that the reviews provided for should be appeals in every sense of the word on the facts and on the law and that the same general provisions and constitutional limitations should apply in such cases as in appeals from the civil courts. Argument, however, might be limited to the submission of a brief.

On the whole we are of the opinion that the functions of the Judge Advocate General's Department should be advisory rather than judicial, and that sentences should be approved or disapproved and new trials ordered or disallowed by military orders rather than by judicial decrees. (P. 46.)

2. Views of the minority (Gregory, Bynum). It would seem that the minority also contemplate reposing the revisory power in the President.

Mr. Gregory says:

The methods now established in the office of the new Judge Advocate General, although administrative, seem to be admirably adapted in most respects to secure an adequate review—

He is referring to General Order No. 7—

and if, in addition the President were given revisory power to be exercised within a reasonable period of time over judgments in general courts-martial; decisions of medical retiring and efficiency boards involving dismissals or discharges from service, and other similar bodies, I would think that this was adequate. (Pp. 91–92.)

In another recommendation the minority say that in case of the adoption of their suggested amendments for securing adequate trials and the President's revisory power, they would not favor any court of review beyond what they contemplate in the Judge Advocate General's office.

That if the amendments herein suggested, for the purpose of securing adequate trial in a general court, and the President's revisory power shall be adopted, with provisions for appeal when the judgment is against the accused, such appeal not ordinarily suspending execution of sentence, then, in my judgment, it would hardly be necessary to provide by law for automatic review in the Judge Advocate General's office of every case and that it should be binding, leaving that to the discretion of the President as Commander in Chief of the Army; nor to constitute further than is here contemplated a court of review as provided for in section 52 in the pending bill. (P. 96.)

I admit that it is difficult to reconcile these quoted views of the minority with the following language which I find in the minority report:

That the defendant should have a right of appeal, where the judgment was against him, to some board of review or similar tribunal, constituted in the Judge Advocate General's department, which board of appeal or board of review should have the right to modify, affirm, or reverse the judgment of the court, and also to grant a new trial; that this should be independent of and in addition to the so-called automatic review of judgments of courts-martial now carried on in the department of the Judge Advocate General, but that so far as practicable where an appeal was taken these functions should be exercised concurrently and by the same board. (P. 95.)

But by reading this last language in connection with the language quoted from pages 91 and 96, supra, I reached the conclusion that what is meant in recommending a board of appeal or board of review

is not that this board of appeal or review should be invested by statute with independent power, but that such board should be administratively established in the Judge Advocate General's department as an advisory agency to the President.

So understanding the minority recommendations, it would seem that, however they may differ in other respects and in lesser details—differences quite to be expected from independent minds—the members of the committee do not differ on the subject of appellate review. This very able and distinguished committee, representative of the bar of the country, after examination and study of the subject, appear to be unanimous in opinion upon the essentials, namely, that the law has not clothed the Judge Advocate General with appellate power; that revisory control of courts-martial should not be divorced from military authority; that legislation should provide additional appellate and revisory power; and that all such power should be lodged within the Army itself, to be exercised, in one form or another, by the President, as Commander in Chief, upon the advice of the Judge Advocate General and his office. Between that message from the committee of the Bar Association and my own expressed views there is no disagreement.

Senator WARREN. General, I think I have seen in this evidence the opinion of at least one witness, or the accusation, that this committee was a committee hand picked by the War Department.

Gen. CROWDER. Yes.

Senator WARREN. Are we to assume from your testimony that you do not agree with that?

Gen. CROWDER. I have stated all the "hand picking" that there was, so far as I was concerned. It was my single suggestion that one out of six of the living ex-Secretaries of War, because of their experience in applying the code, should be named upon the committee.

Senator WARREN. But that suggestion was not taken?

Gen. CROWDER. That suggestion was not taken; and that is the only suggestion that I ever made; and to that extent, and to that extent only, am I guilty of the charge of helping to hand pick the committee.

Senator LENROOT. And the attitude of Judge Page was rather adverse to your view?

Gen. CROWDER. Yes. Senator Lenroot, in the course of my examination, asked me if I was going to speak of the four death cases in France, and I said yes, at a later period I intended to refer to them. In respect of these four death cases I have to answer the charge of Gen. Ansell that—

> The whole military hierarchy, capped by your Chief of Staff and the Judge Advocate General of the Army, who is not independent of the Chief of Staff, clamored and entered into an agreement that these men should die. (P. 149.)

Who the rest of the military hierarchy were, with whom the Chief of Staff and myself were in agreement, is not expressly stated. Presumably it is another of those frequent exaggerations which we find throughout Gen. Ansell's testimony.

I have also to reply to the following allegation appearing in the Congressional Record of January 27, 1919, page 4639:

> What can be said of a Judge Advocate General, the highest judicial officer in the system itself, who pleads for a united front upon the part of all interested in the maintenance of discipline that innocent men may be sent to their doom as sacrifices to discipline?

On pages 134 and 135 Gen. Ansell gives a description of the four death cases from France—two for sleeping on post and two for disobedience of an order to get their equipment and to drill. All four cases came up from the division commanded by Lieut. Gen. Bullard.

In all four cases there was a finding of guilty and the imposition of the death sentence; likewise a letter of Gen. Pershing that accompanied the records and a copy of which will be found on page 141 of the record of these hearings. Gen. Pershing's letter was directed to me and urged upon me the view that there was a military necessity for the execution of these sentences, saying that he regarded the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post. He concluded his letter by saying: "I recommend the execution of the sentences in these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

I had anticipated that the world war would not proceed very far until we had to deal with the execution of the death sentence coming up from the theater of war and I thought I knew the temper of the American people well enough to anticipate that only in case of the most urgent necessity would public opinion sustain the execution of the death sentence. I also appreciated the grave responsibility which would be assumed if, here in the War Department, we undertook to dictate as to the discipline of the Army in the theater of war.

We knew the lenient policy that Lincoln pursued. Speaking from the experience of that war, it was easily to be seen that there was the greatest responsibility incurred by the Secretary of War and the President in disagreeing with the commanding general of a field army and the commanding general of the American Expeditionary Forces, as to what was necessary in the enforcement of discipline in its command, especially during the period of fighting battles.

When the four death cases from France reached the office, I sent them to the best criminal lawyer we had in the office, Maj.—later Col.—Rand, whose position at the New York bar is well known to each member of this committee. He was the assistant of Mr. Jerome in the trial of a great many criminal cases.

He reported that the record was legally sufficient and recommended the execution of the death sentences.

They were sent back to him for rewriting, as it was thought that he had dealt with them too summarily. The records were sent to a number of other officers for report. I do not remember their names. I would not undertake to say how many were called in conference on these cases, but the facts have been given to this committee by Col. Davis and Col. Clark in their testimony at the February hearings. I can speak only as to my own state of mind. I never knew that my attitude, which was for clemency from the beginning, was questioned by anyone, until Sunday, January 19, 1919, when I read an article published in that day's edition of the New York World entitled "The thing we call military justice," a copy of which I can hand the committee, and in which it was reported, in effect, that my attitude in this case was in favor of the execution of this penalty.

I read that article on Sunday. On Monday morning I sent for Gen. Ansell and asked him if he had read the article. He said that he had glanced at it. I invited his attention to the fact that I was

accused in that article of entering into an agreement with other officers to secure an approval of these sentences, and asked him if he could state from recollection what my attitude was. He replied that in substance he could; that he remembered distinctly my coming to his room, very much worried about these cases, and expressing that worry to him and asking him if he would not take the cases and write a review of them. I did not pursue the matter further, except to say, in substance, "Thank you. I am glad your recollection accords with my own," and I was greatly surprised later, in an issue of the Congressional Record, which I think was that of February 19, to find it inferentially stated there to the public by Gen. Ansell that he had been compelled to resort to a communication to the White House through a distinguished member of the House Judiciary Committee to get the attention of the President in these cases in order to stop a concerted action in the War Department, of which I was a part, to take the lives of these men.

Now, in the course of his testimony before this committee Gen. Ansell, using quotation marks, attributes to me the following language, which he says I used in a note, or two notes, to the Chief of Staff. First, he represents me as saying:

I have got the four death cases from France. They are cases in which the commanding general in France is very much interested and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing. (P. 137.)

Again:

We ought to agree to uphold the hands of the commanding general, regardless of the merits. (P. 137.)

Then again:

We ought to agree to support the hands of Gen. Pershing in these cases. (P. 137.)

And again:

I recommend that these men die. (P. 137.)

Again:

I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but understand, when I submit this memorandum to you, I do it with no desire to reopen this case. (P. 138.)

And again:

While these facts suggest clemency, nevertheless I do not recommend it. Gen Pershing, of course, would feel that we had not supported him, and I sympathize with his view. (P. 138.)

Later, Senator Chamberlain and Senator Lenroot asked that these notes that I had written the Chief of Staff be put in the record. They were put in the record. Now, gentlemen, the language that I have read to you, that Gen. Ansell attributes to me, is not to be found in the notes. I ask for an examination of them.

Senator WARREN. These notes as they appear in the record (pp. 141, 145–147), are correct?

Gen. CROWDER. These notes, as they appear in the record, to the Chief of Staff. But this language that I have read to you here, all except just a phrase here and there that has no significance in representing my attitude toward the case, does not appear in the notes. It is his own deduction.

Senator WARREN. You allude to what appears in the testimony?

Gen. CROWDER. I have right here what appears in the testimony before this committee, and then I have in a parallel column the notes I actually sent. Now, his statement passed unchallenged before this committee, that I said what he attributes to me.

I want to state to the committee what actually happened.

Senator LENROOT. You are going into the notes?

Gen. CROWDER. Yes.

Senator LENROOT. Very well; I will not ask the question I was going to ask.

Gen. CROWDER. My first note to Gen. March was sent before I submitted any review on the case at all, and I asked for an interview, and in that very first note I suggested clemency for these men; but I was of the opinion that Gen. March, fresh from the battle fields of Europe, would have a better judgment about the situation than I would have, and I did say to him that it would be unfortunate if we had a divided opinion upon this subject, contemplating always that Gen. March might come to my view. I went up to Gen. March with the cases in my hand, but without a recommendation, and he said in effect that he did have knowledge of battle-field conditions over there, and likewise, I think he said, some knowledge of these specific cases—that he had heard them discussed; and he went on to give me the reasons why he thought Gen. Pershing's recommendation should be sustained, and that there should be an approval.

Backed as I was at that time with the opinion of several officers that the record was legally sufficient to sustain the findings, and also with Gen. Pershing's very unusual and emphatic recommendation that the sentences should be carried into execution, and with Gen. March's pronounced view that they should be carried into execution, I went back to the office and completed the review with this remark:

I recommend that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

And so the cases were submitted in that form. I found that my mind was not at rest on the subject, and I sought an interview with the Secretary of War.

Senator LENROOT. About what date was that recommendation? There does not seem to be any date in the record.

Gen. CROWDER. April 5, 1918, was the date that I wrote my first letter to Gen. March, in which I used this language. That was before I had submitted the cases. I asked for an interview, and I said, "There is a very large question in my mind as to whether clemency should be extended." That was my first attitude, before I had consulted with Gen. March. Then I went up and had this interview, and later on I appended to the review, after my interview with Gen. March, what I have just read to you, by way of final action on the cases.

Senator LENROOT. On the same day?

Gen. CROWDER. I do not remember, but probably, yes.

Then I went to see the Secretary of War about the cases, and I told him about my interview with Gen. March, and that my mind was not at rest on the subject, and that I did feel that we ought to have the kind of conference that would relieve the President from the necessity

of dealing with a divided recommendation. The Secretary of War was receptive, from the start, to clemency in these cases.

I followed up that interview with the Secretary of War with two other interviews direct upon this question of clemency. My whole purpose was to get the War Department to act as a unit on these cases, and believing all the time that we would have to do the rather unusual thing of overruling Gen. Pershing in this matter.

The attitude of the Secretary of War toward these two cases continually strengthened in the direction of clemency, and I recall with some definiteness, when I was talking with him about the embarrassment that would come from overruling the commanding general in the field, that he replied in effect "That is a responsibility I am prepared to take in a proper case."

There never was any necessity for anybody to go direct to the President to stop a concerted action upon the part of officials of the War Department to secure the approval of the death sentences in these cases, and I know of no subject connected with this controversy concerning which there has been so much misrepresentation of the attitude of individuals as there has been in this particular matter.

I wish to put into the evidence, if I may, these parallel columns, which show what I am charged with saying, and show exactly what I did say, in order that anybody by glancing at the parallel columns may find out whether there was any justification for the statement before this committee that I used this extreme language, or that my attitude is correctly stated when they say that I entered into an agreement with the Chief of Staff to secure the execution of the death sentences in these cases.

Inaccuracies of statement are nowhere better illustrated than in what Gen. Ansell says about these four death cases from France.

GEN. ANSELL'S TESTIMONY.

I have got the four death cases from France. They are cases in which the commanding general in France is very much interested and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing. (P. 137.)

We ought to agree to uphold the hands of the commanding general, regardless of of the merits. (P. 137.)

We ought to agree to support the hands of Gen. Pershing in these cases. (P. 137.)

GEN. CROWDER'S MEMORANDUM OF APRIL 5, 1918, TO CHIEF OF STAFF.

APRIL 5, 1918.

MY DEAR GEN. MARCH: Here are the four cases from France involving the death sentence—two for sleeping on post and two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

You will notice that I have not finished the review by embodying a definite recommendation.

It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to

whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at any early date?

E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

CONCLUSION, GEN. CROWDER'S REVIEW OF CASES.

I recommend that these men die. (P. 137.)

The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

I recommend that the sentence be confirmed and carried into execution. With this in view, there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an Executive order designed to carry this recommendation into effect, should such action meet with your approval.

E. H. CROWDER,
Judge Advocate General.

GEN. CROWDER'S MEMORANDUM OF APRIL 16, 1918, TO CHIEF OF STAFF.

I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but, understand, when I submit this memorandum to you, I do it with no desire to reopen this case. (P. 138.)

1. Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited.

* * * * *

While these facts suggest clemency, nevertheless I do not recommend it. Gen. Pershing, of course, would feel that we had not supported him, and I sympathize with his view. (P. 138.)

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience), and a first lieutenant (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for

his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

Senator LENROOT. If you are through with that, I would like to ask you a few questions on the notes.

Gen. CROWDER. Yes.

Senator LENROOT. With reference to the first note, where you say, "There is a very large question in my mind as to whether clemency should be extended," you wish the committee to understand that what you had in mind there was a suggestion of clemency? Is that it?

Gen. CROWDER. That is exactly what I want you to understand.

Senator LENROOT. Of course, the ordinary construction would be rather the contrary, would it not?

Gen. CROWDER. No, I do not think so; but I will admit that it is not as clear a phraseology as I could have employed.

Senator LENROOT. To be perfectly frank with you, it struck me upon reading it, death sentences being the exception rather than the rule, that the suggestion there, in that language, "There is a very large question in my mind as to whether clemency should be extended," did not imply, merely from the reading of the language, a suggestion of clemency.

Gen. CROWDER. Of course, I could have chosen clearer language, had I thought that my attitude as to clemency in this case would ever have been assailed. But, Senator, how could there have been any misunderstanding when you consider my note along with the Pershing letter recommending that the sentences be executed, and the recommendation of Gen. Bullard that the sentences be executed. They favored executing the death penalty. I was raising this new question of clemency, and certainly I was not raising it for the purpose of agreeing with them. So that I do not think that my note, in connection with what it was transmitting for the attention of the Secretary of War, could have been in the least open to this most obvious misconstruction.

Senator LENROOT. Then, at the time of the making of the recommendation itself, what review had been had, or what study had been had, of the facts in these cases?

Gen. CROWDER. First, by Col. Rand, whose qualifications to make the study I have referred to.

Senator LENROOT. Do you know what this study consisted of? Was it more than an examination of the record itself?

Gen. CROWDER. It could not have been any more than that, because it was all the opportunity he had to acquaint himself with the facts.

Senator LENROOT. Then how did the additional facts come to you? That is really what I am leading up to.

Gen. CROWDER. I went back to the office and asked an officer to go up to The Adjutant General's office and ascertain for me the ages of these boys. That was not in the record. I wanted to know how old they were and how long they had served, and what opportunities they had had to learn their duties as sentinels and as soldiers generally; and, aliunde of the record, I got that information.

Then I directed another officer to examine all the cases that had come in from France to see if there were other instances of trial for disobedience of orders and for sleeping on post, and what the sentences had been, and I got that information; and on the basis of that information I became more and more aggressive in claiming clemency for these men, because I found that there were two of them, I think, under 19, and the other two were under 20 years of age, and that all of them had had less than a year's service, and all of them were volunteers.

Senator LENROOT. Then you found some other facts with reference to acquittals of some other charge of a like offense?

Gen. CROWDER. Not acquittals, as I remember it, but very minor sentences, and some instances where the same offense had been tried by special court.

Senator LENROOT. Was there one case where one of the boys involved in the very same transaction was acquitted? As I remember, there was in your review of the facts.

Gen. CROWDER. May I ask you to restate that?

Senator LENROOT. Was there one case where one of the boys——

Senator WARREN. One of the four?

Senator LENROOT. No; not one of the four, but involved at the same time—was acquitted?

Gen. CROWDER. I do not recall that.

Senator LENROOT. Perhaps my recollection is wrong, but I thought I remembered where, in your review of April 10, you cited one case where there was a man named Hindman. Do you recollect?

Gen. CROWDER. No; I do not recollect.

Senator LENROOT. Oh, yes; here it is. On page 144 of this record; William Hindman. The record says:

> This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense.

Neither one of those two is one of the four, is that correct?

Gen. CROWDER. May I glance at that page?

Senator LENROOT. Here it is.

Gen. CROWDER (after examining page 144 of the record). No.

Senator LENROOT. That has nothing to do with any of these four in these cases?

Gen. CROWDER. No; I do not think so.

Senator LENROOT. Then, what have you to say as to the reviewing officer or the court itself, in extreme sentences of this kind, not supplying for the record these very pertinent facts that you afterwards discovered?

Gen. CROWDER. The failure to do so has got to be charged up, it seems to me, to the exigencies of the battle field and of the zone of active operations. I do not like to think that it is possible that a death sentence should come up here for review upon a record which failed to show many things which were necessary to be shown of record to form the judgment of the confirming authority respecting the action finally to be taken. I had a little less severe condemnation of that after reading a corresponding record which has been placed in evidence before this committee, in the British service. It is, if anything, more meager than the records in these four cases, and the man who was tried and convicted was not allowed to live more than 48 hours, when he was executed. There are two such cases in the record before you, of corresponding trials by the field court-martial of the British Army, placed in evidence by Col. Rigby. I supposed that a man like Rand and a man like Wigmore, who also made a study of these sentences, would comment on the very point that you have brought out, but they appeared to be willing to concede something to the exigencies of the battle field, and to the judgment of men on the ground, and it always entered into my head in passing judgment upon that phase of the situation that as good a soldier as Gen. Bullard and as good a judge advocate as Col. Winship, who was upon his staff, appeared to be satisfied with the evidence in the case.

Senator LENROOT. Nevertheless, General, would you not say that it was a most unfortunate condition of affairs where a death sentence inflicted for the purpose of discipline—because that was the primary purpose of the extreme sentence—should be inflicted without the record containing full facts in connection with it?

Gen. CROWDER. I hope we will have very few such cases to deal with in the future.

Senator LENROOT. Did it occur to you and the other reviewing authorities that for a death sentence there had been no adequate and proper defense here of these boys?

Gen. CROWDER. I think we all regretted, and I expressed that regret in my note, that the cases had not been more adequately presented. The only pause that I had in the matter, Senator, was the positive recommendation of such soldiers as Gen. Bullard and Gen. Pershing.

Senator LENROOT. Well, are we to understand from that, General, that for the sake of enforcing discipline you were willing to rather give less weight to the rights of an accused than you otherwise would?

Gen. CROWDER. No; I could not have entertained that view but for the judgment of these distinguished lawyers from civil life, with which I ultimately concurred, that the record was in itself legally sufficient to sustain the findings and sentences. Here we were sitting, 3,000 miles away from the field of action, matching our judgments against the men with as high or higher responsibility, who were in close contact with all the facts, and the situation that had to be dealt

with. Here was the judgment of two distinguished lawyers, at least, from civil life, that the record was sufficient; and now you have before you those two records of the field general courts-martial of England, which show that they also had to execute men upon that kind of a record.

Senator LENROOT. Of course it will be conceded by everyone that legally the record was sufficient, I suppose; and yet the very meagerness of the record, and what did appear upon the record, while from a legal standpoint it was sufficient, might have suggested to anyone, it seems to me, that these men ought not to be executed without further ascertainment of facts.

Gen. CROWDER. My position was this, and let me be held responsible for it, that I would make this fight before the Chief of Staff, and that I would make it before the Secretary of War, but that I would not go against their judgment and complicate the matter before the President of the United States. That was my position. I made the fight before the Chief of Staff; I made the fight before the Secretary of War, in behalf of these men; but it was not necessary to go before the President with a divided opinion except in so far as Gen. March differed from the Secretary of War and myself on those cases.

Senator LENROOT. Now, one further question. This note of yours, following the conference, did contain the unqualified recommendation that the sentence be carried out?

Gen. CROWDER. Please remember that when I wrote that note I had not the facts aliunde of the record.

Senator LENROOT. Yes; you got these additional facts outside of the record?

Gen. CROWDER. Yes.

Senator LENROOT. And on April 16 you wrote Gen. March another letter?

Gen. CROWDER. Yes.

Senator LENROOT. Containing all of these facts?

Gen. CROWDER. Yes.

Senator LENROOT. But there was no suggestion in this letter of a change in recommendation, upon your part, was there?

Gen. CROWDER. No explicit change of recommendation; but the whole effect of the letter was to suggest to him a lack of finality in the first recommendation.

Senator LENROOT. The language is:

> Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think yonr attention should have been invited.

Gen. CROWDER. Yes.

Senator LENROOT. Then you go on with the facts. But is there any suggestion in your letter that so far as your final recommendation is concerned, you desired to change it?

Gen. CROWDER. Not unless you can read that into the letter. I did not use——

Senator LENROOT. From the submission of the facts, yes?

Gen. CROWDER. I had some motive for doing it.

Senator LENROOT. Oh, yes; certainly.

Gen. CROWDER. I know my own state of mind. I know the embarrassment to a President, of divided opinion in a grave matter, and all my effort was to get one view of this case so as to simplify the President's problem in passing upon the case; I conferred with the Secretary of War and the Chief of Staff and consulted officers in my own department, always with the idea that the clemency view would prevail, and saving to myself a position in the case where I would not bring about this state of divided opinion before the President.

Senator LENROOT. Now, this was dated April 16, 1918. What next occurred, so far as you are concerned with it?

Gen. CROWDER. Nothing further occurred except some interviews with the Secretary of War, three in all, the dates of which I can not remember well enough to put them into the record. Whether they followed this letter or not I would not like to say positively, but I am sure that until the Secretary of War finally acted I kept up my conferences with him for the purpose of seeing that he had assumed 100 per cent responsibility for final action upon the case.

Senator LENROOT. Upon what point, as you remember, or as nearly as you remember, did you explicitly change your view with reference to carrying out the sentence, in conversations with the Secretary of War?

Gen. CROWDER. I never had to change my views. I had only to deal with this statement that I have made here in the record; first, of recommending clemency or suggesting clemency; second, submitting the case for execution, after a conference with the Chief of Staff; and then, third, bringing these additional facts to his attention, my mind being always in one attitude toward the case, but always subordinating an expression of that view to what was the ultimate and combined judgment of the War Department as to the necessities of the situation as interpreted by the commanding general of the American Expeditionary Forces in France.

Senator LENROOT. But, General, must there not have been at some point a changed attitude upon your part? Because after this conference, you did formally make the recommendation that the sentence be executed.

Gen. CROWDER. Yes; after the first conference.

Senator LENROOT. Now, after that——

Gen. CROWDER. The next day.

Senator LENROOT. Yes; and after that, you must, to the Secretary of War, it seems to me, have expressed a reversal of your formal recommendation.

Gen. CROWDER. In every one of these three interviews I expressed to him this view that I had, which I would have carried out if it were not for the necessity of coordinating action of the War Department in these grave matters. It was not a question of law upon which I was expected to speak an independent word. It was a question of clemency. If it had been a question of law, it would have been a different matter; I should not have consulted with the Chief of Staff or any military man respecting the legal view. But this was purely a question of clemency, a question that the Secretary of War and the Chief of Staff have as much to do with as the Judge Advocate General.

Senator LENROOT. Then, do I understand that so far as clemency itself was concerned, you took no part in it, or assumed no responsibility for it, except the bringing of the additional facts, subsequent to your formal recommendation, to the attention of the Chief of Staff and the Secretary of War?

Gen. CROWDER. In both written and oral interviews.

Senator LENROOT. Yes.

Gen. CROWDER. That is true, and I do not know how I could have——

Senator LENROOT. But you at no time changed your view as to the carrying out or execution of the sentence? In other words, you are willing to stand upon your formal recommendation as originally made?

Gen. CROWDER. I never withdrew that recommendation.

Senator LENROOT. That is what I am getting at.

Gen. CROWDER. I never withdrew it, but the Secretary of War has had my personal view as to my personal desire to see him overrule the recommendation.

Senator WARREN. Let me ask a question a little aside from this line, if I may interrupt.

Senator LENROOT. Certainly.

Senator WARREN. As to this question of capital punishment, a question that is very much discussed and differently administered—that is, the sentences for capital punishment—many believing that there should be no such thing as capital punishment: Do you recommend that the final punishment of death for certain offenses in the Army should be done away with entirely—capital punishment entirely abandoned and eliminated from the Articles of War?

Gen. CROWDER. I know of no offense denounced and punished by death in the military code as it exists to-day where the death penalty can be properly abrogated. We cut it down somewhat in the revision of 1916.

Senator WARREN. But you believe that finally there should be a specific law providing that certain cases should proceed to that end?

Gen. CROWDER. Do I believe what?

Senator WARREN. That there should be, in the finality, certain crimes—if I may allude to them as crimes—some offenses, for which the death penalty should be pronounced and executed? You do not believe in abrogating capital punishment in the Army?

Gen. CROWDER. Oh, no; it is impossible.

Senator WARREN. When I think of the Army, I am reminded of the times when I used to stand guard myself as a private soldier, where we were likely to be picked off by the enemy, any time; and I know how hard it is for a boy 16 or 17 years old to keep awake, unless there is something that scares the very life out of him, to keep him interested.

Senator LENROOT. If I understand your attitude, it is that so far as you were personally concerned, you were from the beginning in favor of clemency, but that you desired united action upon the part of all those who were responsible, and that you made this formal recommendation for the carrying out of the sentence, but you would have been glad if Gen. March would have been willing, and the Secretary of War had been willing, to recommend clemency. But if they were unwilling to do that, you were willing to assume your share of the responsibility, leaving the original notes to stand?

Gen. CROWDER. That is correct; but if you will allow me to put in there, that the duties of the Judge Advocate General in a case of that kind are two-fold. One is to pass upon the legality and regularity of the record; its freedom from prejudicial error or reversible error or jurisdictional error. In that field he has an undivided responsibility in which it would be rarely justifiable for him to consult with any military authority.

The second is the duty in regard to clemency, where there was a necessity of coordinating action and of establishing a policy which would govern during the period of the war. It was on that side and that side alone that I sought conferences with superior authority, and the motive that I had in every conference conducted was to bring about clemency, if we could without detriment to the efficiency of our fighting forces, in a matter where Gen. Bullard and Gen. Pershing had placed themselves on record in favor of a specific action. Now, if it be a crime for the Judge Advocate General on that side of his duties, where coordination is necessary, to consult with a superior authority, I am that criminal. I never consulted with them on the ground of the sufficiency of the record. I did consult with them on the ground of the degree of clemency that should be extended in this case, and I never had but one attitude of mind toward it, that I was not willing to make the President's duty more difficult because of any view that I had on the subject that arrayed itself against the view of the Secretary of War, the Chief of Staff, Gen. Pershing, and Gen. Bullard. Now, I hope I have made my position thoroughly clear there, so that hereafter nobody will be able to misunderstand my position. It is very important, if I understand it, to keep in mind that on one side of my duties I had an undivided responsibility which I could not share with anybody, while on the other side I had a divided responsibility.

Senator LENROOT. Did Gen. March make a recommendation similar to your formal recommendation?

Gen. CROWDER. Yes.

Senator LENROOT. What other recommendations were there—aside from Gen. Pershing's, I mean; I mean here in the department?

Gen. CROWDER. The cases went before the President and the Secretary of War with my recommendation and Gen. March's recommendation, and of course with the recommendations which had been made of record, of Gen. Bullard and Gen. Pershing.

Senator LENROOT. Yes.

Gen. CROWDER. Then, as the result of this further study that I made, simply because my mind was not at rest upon this question of clemency, there was a further report submitted by me in which I had used very largely the reports submitted by Gen. Ansell, Col. Clark, and perhaps Col. Davis also, who cooperated, getting up these additional facts.

Senator LENROOT. But, in the first place, the formal recommendations, so far as those in the department here were concerned, were those of Gen. March and yourself to the Secretary of War?

Gen. CROWDER. Yes.

Senator LENROOT. And if Gen. March had looked upon it as you did, instead of your making the recommendation for carrying out the recommendation of the sentence, it would have been just the reverse?

Gen. CROWDER. Yes; if I had secured agreement.

Senator LENROOT. So that, did you rather yield in that respect to Gen. March's judgment in order to secure agreement?

Gen. CROWDER. I yielded to the judgment of a man fresh from the battlefields.

Senator LENROOT. Yes; but I am referring to the fact.

Gen. CROWDER. On the question of clemency only.

Senator LENROOT. Yes, I understand.

Gen. CROWDER. Not on any duty that devolved on me as the Judge Advocate General. But on the question of clemency I went to him, because he was but recently from there; and I found out that he had discussed these cases before he left France.

Senator LENROOT. That is all.

Gen. CROWDER. There is one other matter, before I proceed with the discussion of the pending bill. I represented to you yesterday that the English war department had sought by admonition to regulate punishments and to control sentences of courts-martial. I have this morning to bring to your attention their standing regulation on the subject, which is paragraph 583, subheading XI, of their King's Regulations, corresponding roughly to our Army Regulations. [Reading:]

The following general instructions are issued for the guidance of courts-martial, but nothing contained in them must be construed as limiting the discretion of the court to pass any legal sentence, whether in accordance with these instructions or not, if in their opinion there is good reason for doing so.

And then follows a list of punishments that they think appropriate. That was before the war came on.

In 1917 I find that they issued the following order to the British armies in France. This order was issued by Field Marshal Haig, January 1, 1917. [Reading:]

[Extracts from general route orders issued to the British armies in France by Field Marshal Haig, Jan. 1, 1917.]

COURTS-MARTIAL—GENERAL INSTRUCTIONS.

The commander in chief has had under consideration certain sentences recently awarded by courts-martial. It would be improper for him to interfere in any way with the discretion of a court-martial as to the sentence to be awarded, but, at the same time, he is of opinion that the unequal sentences awarded by courts-martial for similar crimes show that many officers do not sufficiently appreciate the precise quality of the offenses with which they have to deal.

He wishes to point out that certain offenses which in peace time are adequately met by a small sentence, assume, on active service, a gravity which wholly alters their character.

This principle is fully recognized in military law; for instance, in the case of desertion, the army act in time of peace permits a maximum sentence of two years' duration only, whereas on active service a court is allowed to award a sentence of death for the same offense. Similar considerations apply to cases of looting and to other offenses specified in sections 4 and 6, army act.

The commander in chief wishes to impress upon all officers serving upon courts-martial that it is their duty to give weight to considerations of good character, inexperience, and all other extenuating circumstances, but that, at the same time, they are seriously to consider the effect which the offense in question may have upon the discipline of the Army, upon which its safety and success depend, and if they come to the conclusion that a sentence, however severe, is necessary in the interests of discipline, no feeling of commiseration for the individual must deter them from carrying out their duty.

Upon my return to the office of the Judge Advocate General last January, I got out the following instruction. This was after the armistice. [Reading:]

GENERAL ORDER JANUARY 22, 1919—MAXIMUM PUNISHMENTS.

In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December 15, 1916, is obvious. Where in exceptional cases a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record. Trial by general court-martial within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the 104th article of war would be under all circumstances of the case clearly inadequate.

Now, I told you that I got a part of the verbiage of that order from an order that had been prepared by the chief of the military justice division of my office in the summer of 1918, and submitted to Gen. Ansell in September of that year, which had been sent back for further revision and study, and was not published. Of course at that time no reference could have been made to the cessation of hostilities, but a reference could have been made to conditions here in the United States approximating those of peace, where the severer punishments, including the death penalty, were not necessary, and in that way an admonition could have gone to the Army which, I think, as I said yesterday, would have been productive of greater uniformity of sentence, and would have defeated many of the excessive sentences that were adjudged in this country.

Senator LENROOT. Was that an order signed by the President?

Gen. CROWDER. It was issued by his authority. Those statements cover all the matter necessary to connect up with the testimony heretofore offered, and I am ready now to take up the discussion of the pending bill and its application to a hypothetical case.

APPLICATION OF SENATE BILL 64 TO A HYPOTHETICAL CASE.

I think we may best reach an understanding of those sections of the proposed bill which have to do with actual trials before courts-martial by giving those sections a hypothetical application to a specific case; and, because I know that this committee would not report, nor would Congress enact, a bill which would not meet the requirements in the trial of purely military offenses—which I have stated to you constitute about 86 per cent of the cases tried during the war—I shall discuss the application of those sections to such a case, namely—alleged disobedience of a colonel commanding a line regiment, of competent orders to put his regiment into battle—a case where the evidence is primarily tactical or strategical, and wholly military. When I have finished with this typical military offense I shall try to explain the application of the pending bill to the trial of a common-law or statutory felony, which I have told you make up from 8 to 12 per cent of the cases. Let us see what would happen under the proposed bill at the successive stages of the trial of the assumed case of purely military offense, commencing with the preferring of the charge.

PREFERRING OF THE CHARGE.

Under the pending bill the charge would be preferred in the first instance by "a person subject to military law who can make oath that he has actual personal knowledge of the matters set forth in the charge." It will rarely be the case that one such person has all this knowledge. The proposed law takes care of this situation. If such person has not the actual knowledge, or is lacking in knowledge in part, he must personally investigate and make oath on information or belief (art. 18). The charges are duly prepared and forwarded to the brigade commander.

The brigade commander's duties are set forth in article 19. He makes, or causes to be made, a thorough investigation as to the truth of the matters set forth in such charge. The accused is heard in his own behalf and by available witnesses he may offer. In forwarding the charge, the brigade commander must accompany it with statements of the substance of the testimony taken on both sides and all other evidence, including the statement of the accused.

Down to this point, with the exception of the requirements that the signer of the charge must be a "person subject to military law," and, therefore, an officer, enlisted man, or retainer to the camp, who must make oath on actual knowledge, or on information and belief as the result of an investigation made by him, the new procedure is substantially the existing procedure under sections 75 and 76, M. C. M., as modified by C. M. C. M. No. 5, July 14, 1919, and no great embarrassment would result from the enactment of that part of the pending bill.

I shall not object at any stage to the requirement that the man who prefers charges against another shall himself make oath to those charges, either of personal knowledge or upon information and belief. I am not certain that it will serve any useful purpose, I am not certain that it will curtail the number of charges that are preferred, but I am willing to do anything that will give the public confidence in the manner in which trials by court-martial are conducted, and will give them confidence in the fairness of the manner in which officers who are conducting courts-martial are discharging their duties in that connection. Therefore, you need expect no opposition from me to that provision in the bill.

REFERRING THE CHARGE.

The next step is the forwarding by the brigade commander of the charge, with all accompanying papers, to the next higher authority having general court-martial jurisdiction, namely, the division commander, upon whose staff there is, under existing tables of organization, an officer of the Judge Advocate General's department with the rank of major or lieutenant colonel and hereinafter designated the division judge advocate. The division commander is under the mandatory requirement to refer the case to the division judge advocate who must be an officer of the Judge Advocate General's department; who, in the usual case, is a man with little or no military education or training.

Certainly nobody can object to that, and down to that point this is exactly the existing practice. I do not believe there has ever

been a general court charge referred for trial, during the World War, or for a long time past, by any convening authority that was not preceded by an examination and report of the judge advocate on his staff, and I have no objection; if you put it in the law, it will not change matters at all. But he has this other duty——

Senator LENROOT. Would that apply all the way down to the court-martial of an enlisted man?

Gen. CROWDER. It would not apply to a special court, but to a general court.

Senator LENROOT. Yes, I understand; but of a general court-martial?

Gen. CROWDER. I do not believe there is a case on record where a department commander referred a case for trial until he had a report of his judge advocate upon the legal pleadings in the case.

Senator LENROOT. Of course, if the convening authority was of lower rank than the commanding officer——

Gen. CROWDER. I do not care how low he is; he may be a colonel, you know, commanding a territorial department, but he has got his judge advocate, and in all his actions he is governed by this same rule and procedure and practice.

Senator LENROOT. I was thinking more of the qualification of an individual.

Gen. CROWDER. The judge advocate is the same, irrespective of the rank of the commander of the organization or territory or department.

Senator LENROOT. What would you say if the convening authority is the colonel of a regiment?

Gen. CROWDER. Yes; a colonel may fall into command of a territorial department; but the department staff remains.

Senator WARREN. Yes; of course.

Gen. CROWDER. But the judge advocate has this other duty. He is vested under the pending bill with the exclusive power to decide (a) not only whether an offense punishable by the Articles of War is charged with legal sufficiency, but also (b) that there is prima facie proof that the accused colonel is guilty. It must be borne in mind that the assumed case is a disciplinary one where the evidence is primarily strategical or tactical and wholly military. The exclusive power of determining the sufficiency of this strategical, tactical and wholly military evidence is vested in an officer who, as I have said, in the usual case is without military training or experience. Both the brigade commander and the division commander may see, in the facts of the case—the failure to put his regiment into action—a grave military offense affecting vitally the fighting efficiency of the division and threatening the fighting efficiency of the Army, but the final decision of this question of the sufficiency of evidence is vested by law in the division judge advocate. Unless he will indorse on the charges, using the actual language of this proposed new law—"that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged" there is an end of the matter. In such a contingency the same article 20 provides that the charge shall not "be referred to or tried by a general court."

I am told that this parallel print of the bill is rather inaccurate.

Senator WARREN. I think there was one copy of it here that had the changes made in it.

Gen. CROWDER. In other words, if this subordinate law officer, who is ordinarily without military training and experience, is not convinced that there exists a prima facie case, there is an end of the proceedings and the accused colonel escapes trial.

Senator LENROOT. Now, I want to get this clear in my mind. In the hypothetical case the charge is of a refusal to obey an order?

Gen. CROWDER. Refusal to put his regiment into action.

Senator LENROOT. Not through refusal of an order, but failure to perform a duty?

Gen. CROWDER. No, to obey an order which he receives in action at a particular time and refuses to obey. And it may be remembered that the same awkward situation may arise when the evidence is not strategical or tactical, but still military.

In the accused's statement, or in the statement of his witnesses which accompanies the charges, there may be found evidence showing that he did not attack because of the tired condition of his men; that his regiment had been imposed upon by being kept in the line longer than other regiments; or that he had an unusual number of sick; or that his rations were short or his supplies insufficient; or that to attack meant the annihilation of his regiment. This kind of evidence presents military questions to be decided; but under the new law it is not the division commander aided by his military staff, all with extensive training and experience, who will decide this question—it is a judge advocate with little or no military experience or training. I regard this veto power of the division judge advocate over the division commander as one of the grave defects of the pending bill.

Senator LENROOT. Right there, I do not know that I have it, but in the print I have before me it is not the investigation that the judge advocate would pass upon, but only the legal sufficiency of the charge.

Gen. CROWDER. Oh, no; he takes the evidence that accompanies the charges, and he must determine that there is a prima facie case against the accused.

Senator LENROOT. I see; that is right. He must determine that there is a prima facie case?

Gen. CROWDER. Yes.

Senator LENROOT. If we stop with the charge itself—with the legal sufficiency of the charge—the criticism would not apply?

Gen. CROWDER. No.

Senator LENROOT. I see. You are speaking of the bill before you—S. 64?

Gen. CROWDER. Yes. Now, I am going to assume that the judge advocate entertains correct views or that he defers to the views of military men on such questions and finds that a prima facie case exists, thus permitting the division commander to refer the charges for trial, in order that we may consider and discuss the next stage of the trial, which is the appointing of the court.

APPOINTING OF THE COURT.

It is provided in article 8 of the pending bill that the division commander may appoint a general court-martial, but it seems that he can do no such thing. His appointing authority is completely exhausted when he has performed the following three acts:

(*a*) When he designates, under article 10, a panel (strength not stated) "consisting of those who are by him deemed fair and impartial and competent to try the cases to be brought before them" (whether he is to constitute a large panel to be drawn from whenever courts-martial are to be convened in his command, or a special panel for each case, is not clear);

(*b*) When, under article 12, he appoints a court judge advocate—"an officer of the Judge Advocate General's Department, if such an officer is available, and whenever such officer is not available the appointing authority shall select that available officer of his command whom he deems best qualified therefor by reason of legal learning or aptitude, or judicial temperament;" and

(*c*) When, under article 21, he appoints a prosecutor—"an officer of the Judge Advocate General's Department, and if such an officer be not available the prosecutor shall, whenever practicable, be an officer or enlisted man deemed by the appointing authority specially qualified for the duty by reason of learning in or aptitude for the law; and one or more assistant prosecutors, when necessary, each of whom shall be competent to perform all the duties of the prosecutor."

The court judge advocate actually appoints the court; that is, he selects from the division commander's panel the eight members who are to constitute the court (art. 10 and art. 12a). Though, of course, not intended by those who drafted the pending bill, it is possible that the eight members of the court for the trial of this accused colonel may all be enlisted men (arts. 4, 5, and 17).

Of course, Senator Chamberlain did not intend that, and Gen. Ansell did not intend it. I take it that they did not intend it because there is in article 5 a provision in regard to the mimimum number of enlisted men that must be upon a court in certain cases, but not stating any maximum; but it is a defect in the bill which I pass without laying stress upon it, because I know that if they were present they would say it was not intended.

Thus it appears that when the division commander appoints a court judge advocate, furnishes him with a panel, and appoints the prosecutor, he is through. All other affirmative acts necessary to be performed in appointing the court for the trial of the accused colonel must be performed by the court judge advocate. Let us assume that the court of eight members consisting of general officers and of colonels, superior in rank to the accused colonel, has been appointed and that we are at liberty to consider the next step, which is the organization of the court.

THE ORGANIZATION OF THE COURT.

The eight members selected by the court judge advocate from the panel, and the accused, with military counsel of his own selection and also with civilian counsel of the accused's selection employed by the court judge advocate and paid by the Government in case of acquittal (art. 22), meet on the date and at the place designated by the court judge advocate. We have first to consider the affidavits of prejudice which counsel for the accused may file. These are of three kinds:

First. Affidavits of prejudice, accompanied by certificates of good faith by the accused's counsel, against the division commander, alleging bias or prejudice on his part (art. 23):

Second. Affidavits of prejudice, accompanied by certificates of good faith by the accused's counsel, against the court alleging that by reason of any matter touching its constitution or composition it can not do justice (art. 23).

These two kinds of affidavits of prejudice are to b passed upon by the court judge advocate who sits in judgment on the division commander who appointed him to determine his bias or prejudice in making such appointment, also in designating the panel from which he selected the court, also in his decision to refer the charges, and also in his appointment of prosecutors, which are the only affirmative acts which devolve upon the division commander in respect of the trial. The court judge advocate also sits in judgment, in ruling upon the second class of affidavits of prejudice, on his own action in drawing the eight members of the court from that panel. If the court judge advocate holds that the division commander has shown bias or prejudice in any or all of his affirmative acts relating to the appointment of the court, or if he holds that the court that he himself has constituted may not proceed with "absolute impartiality," then the further organization of the court is stopped and the court judge advocate reports to the division commander. Article 23 continues: "Thereupon the next superior authority may appoint a court for the trial of the case," a clause of doubtful construction but which would probably be held to mean that the next superior authority—that is the corps commander—may designate a panel and appoint another court judge advocate, and the procedure above outlined would be reenacted with the hope, though not the certainty, of obtaining a different result.

Third. Affidavits of prejudice, accompanied by certificates of good faith, against the court judge advocate. No one passes upon this affidavit. With the filing of it the court judge advocate automatically ceases to function and the law requires a new court judge advocate to be appointed.

Of course this procedure of filing affidavits of prejudice against the court judge advocate may go on indefinitely, without further restriction than that the affidavits of prejudice must be certified by the counsel for the accused that they are made in good faith.

But let us assume that none of these three kinds of affidavits of prejudice have operated to block the trial; that the court judge advocate has not himself been challenged and has properly ruled on all other affidavits; that he has properly ruled on all challenges for cause which, under article 12 (b), he is given exclusive authority to pass upon; and that we have a duly organized court of eight general officers and colonels, superior in rank to the accused, with the prosecutor, court judge advocate, and counsel, all appointed or selected and ready to proceed further with the case; in order that we may discuss the next stage, namely, incidents of the trial.

INCIDENTS OF THE TRIAL.

The pending bill makes the court judge advocate in a very real sense the arbiter of the trial, as the following statement shows:

(*a*) He sits with the court (except when it is in closed session), though not a member of it. (Art. 12.)

(*b*) As we have seen, he passes upon all challenges, including affidavits of prejudice directed against the division commander and the court. (Art. 12 (b).)

(c) He advises the court and the division commander of any legal defects in the constitution and composition of the court, or in the charge before it for trial. (Art. 12.)

(d) He grants continuances upon the request of either prosecutor or accused's counsel. (Art. 25.)

(e) He rules upon the admissibility of evidence (art. 12b) applying the "rules of evidence which are generally recognized in the trial of criminal cases in the District Courts of the United States" (art. 41) and, because of this requirement of article 41, denying recognition of those exceptions to such rules as are recognized by such eminent authority as Greenleaf, viz: "Those which are of necessity created by the nature of the service and by the constitution of the court and its course of proceeding" (Greenleaf on Evidence, Vol. III, 16th ed., p. 49), denying also the applicability of the doctrine laid down by Winthrop, who says (vol. 1, p. 473):

"That in the absence, therefore, of statutory direction, they (courts-martial) can scarcely be held bound to the same direct adherence to common-law rules (of evidence) as are the true courts of the United States, and upon trial they may properly be allowed to pursue a more liberal course in regard to the admission of testimony and the examination of witnesses than do, habitually, the civil tribunals. (Grant *v.* Gould, 2 H. Black., 104; Kennedy, 120; Tullock, 13; Bombay, R. 19; Pratt, 198.) Their purpose is to do justice; and if the effect of a technical rule is found to be to exclude material facts or otherwise obstruct a full investigation, the rule may and should be departed from. Proper occasions, however, for such departures will be exceptional and unfrequent."

(f) He also rules upon pleas and motions. (Art. 12 (b).)

(g) At the conclusion of the case he sums up the evidence and discusses the law applicable to it, unless both he and the court consider it unnecessary. (Art. 12 (d).)

(h) "His rulings and advice given in the performance of his duty and made of record shall govern the court-martial." (Art. 12.)

It thus appears that in respect of every military incident the court judge advocate is, in a very real sense, the arbiter of the trial as fully as is the trial judge in the civil court; and he has even wider and more extensive power than the civil judge in the respects next to be noted, that is, with reference to the findings and sentence of the court.

FINDINGS AND SENTENCE.

The case has followed the routine of trial as outlined above. The court judge advocate has passed upon affidavits of prejudice against both the division commander and the court; upon challenges, peremptory and for cause; upon pleas to the jurisdiction and special pleas in bar, such as, of the statute of limitations, former trial, pardon or amnesty, constructive pardon, etc.; upon motions to quash or for continuances; has ruled on all questions of admissibility of this strategical, tactical, and wholly military evidence, and on all other questions arising in the procedure of the court on the trial; has "advised" the court with binding authority, and the convening authority, as to defects in the charges. He has also summed up the evidence in the case and discussed the law applicable to it; and the court has gone into closed session for the purpose of deliberating upon its findings. It may be that the question involved under the evidence as presented is not whether the colonel did obey his orders, but whether he ought to have obeyed them. The court-martial has reached its findings, which are announced in open court by the court judge advocate. Let us assume for the purpose of continuing the discussion that the finding is guilty as charged. What is the further procedure?

The court judge advocate has the following duties respecting the findings of the court:

1. He may approve the findings when, as a matter of law, the evidence of record requires such action. When as a matter of law the

evidence of record requires such action he may withhold approval of the findings or disapprove the findings. If he adopts either course and then stops, what is the result? Is it an acquittal? This, I think, must be the result, for the law charges him with the duty of approving the finding, and it must, I think, be held that his action on the findings is necessary to their validity and that his power to approve includes the power to withhold the approval or to disapprove, and in either event to acquit. This conclusion seems to be justified when we consider his next duty in respect of the findings.

2. He may approve only so much of the finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense, when, as a matter of law, the evidence of record requires such action. Of course, if he withholds full approval of the finding of guilty and approves only the finding of guilty of a lesser and included offense, this, under well-established doctrine, is a finding of not guilty of the major offense charged. It would seem, therefore, that we must hold, as noted under subhead 1, that the withholding of approval, or the disapproval of the finding of guilty, amounts to a finding of not guilty or acquittal. Viewed in this light the finding of guilty by the court of eight brigadier generals and superior-rank colonels has no validity in and of itself, when as a matter of law, in the opinion of the court judge advocate, the evidence of record requires withholding of approval, or disapproval, or a finding of guilty of a lesser included offense. It is also plain that the court judge advocate weighs the evidence under the doctrine of reasonable doubt and himself makes the determination of the degree of guilt or of innocence of the accused.

Now, as to the sentence and the exclusive power of the court judge advocate to impose it: With the imposition of sentence necessary to meet the needs of discipline in this assumed case of disobedience of orders to put a regiment into action, neither the court of eight brigadier generals or superior-rank colonels, nor the division commander, nor any other military man, up to the President of the United States, has anything to say. It is wholly the responsibility and duty of the major or lieutenant colonel, judge advocate, drawn, in the usual case, from civil life, of limited or no military training or experience, but a man "specially qualified by legal learning and experience" (art. 12). The accused colonel's sentence should depend, of course, largely upon the needs of discipline in the command but the measure of his punishment and its character lie in the discretion of a subordinate law officer.

To sum up the requirements of the pending bill as to findings and sentence, we have to note:

1. That the court judge advocate, in disagreement with the court as to the credibility of witnesses or weight of testimony, may, by withholding approval or by disapproval, convert a finding of guilty of disobedience of the order to fight into a finding of not guilty or an acquittal; or into a finding of not guilty of willful disobedience but guilty of the lesser and included offense of failure to obey, or simple neglect of duty with a minor degree of criminality; or attaching to the facts proved no criminality. And in respect of the action of the court judge advocate upon the findings, the law is careful to provide that "such action shall be held to be the action of the court." (Art. 12f.)

2. That the court judge advocate may, in disregard of the judgment of all military men, impose, not a dismissal with imprisonment,

but a simple reprimand, or no punishment at all, in case he finds under the evidence such justifying circumstances that he can not attach criminality to the facts proved.

3. That the court judge advocate may suspend, in whole or in part, any sentence short of death or dismissal.

No one can follow the course of the trial as I have outlined it and fail to appreciate the fundamental changes, which are as follows:

1. The division commander is deprived of his present authority to refer charges for trial; except as permitted by the division judge advocate.

2. The division commander is deprived of his authority to appoint the members of a court-martial, his only duty being the furnishing of a panel from which the court judge advocate selects.

3. The court once selected and organized sit only as triers of fact about the same as petit juries sit. All questions arising during the progress of the trial (except possibly adjournment), including continuances, are decided by the court judge advocate.

4. The finality of the court's findings is taken away. In practical effect the court simply recommends findings which the court judge advocate may approve or disapprove; or modify to express a finding of guilty of a lesser included offense.

5. The court loses entirely its power to impose a sentence; the measure of punishment to meet the disciplinary needs of the Army is determined by the subordinate law officer—the court judge advocate.

6. Convening authorities (ordinarily division commanders) and confirming authorities (the President, and commanding generals of armies) lose their authority to review for jurisdictional or invalidating error, and that power is vested in a court of military appeals, consisting of three civilian judges; and also their authority over the sentence except by way of mitigation of punishment after the fact.

In other words, officers of the combatant army are stripped of practically all their power of enforcing discipline through the agency of general courts-martial.

Let us assume that the court judge advocate has, in agreement with the court, imposed a sentence of dismissal and imprisonment for a fixed term, as he is authorized to do under proposed article 62 of the pending bill; that the accused colonel is not content with the sentence and therefore does not waive in open court and of record a further review of the case, as he may do under article 52 of the pending bill. Under these assumptions the record of the trial is completed and forwarded to the division commander.

The division commander neither approves nor disapproves the findings and sentence, nor does he comment upon the proceedings in any way. His sole duty, upon the receipt of the record, is to forward the record without delay to the Judge Advocate General of the Army. (Art. 38.) The sole function of the Judge Advocate General of the Army is to "immediately transmit to the court of military appeals the record of all proceedings which carry sentences involving death, dismissal, or dishonorable discharge, or confinement for a period of more than six months." (Art. 51.) And it may be remarked, incidentally, that the whole duty of the Judge Advocate General with respect to all other general court-martial cases is to "receive and file" the record of them. (Art. 51.)

COURT OF MILITARY APPEALS.

The court of military appeals consists of three civilian judges sitting in Washington. They are entirely outside of and unconnected with the Army. They are citizens "learned in the law," appointed by the President, by and with the advice and consent of the Senate, holding office during good behavior, with pay and emoluments, including the privilege of retirement upon full pay, of a circuit judge of the United States. (Art. 52.) They are as supreme in the colonel's case, upon appeal, as the court judge advocate was upon its trial. With respect of the findings and sentence, they exercise the following powers:

(*a*) They can disapprove a finding of guilty because of errors of law evidenced by the record and injuriously affecting the substantial rights of the accused, without regard to whether such errors were made the subject of objections or exceptions at the trial;

(*b*) For the same reasons they can approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(*c*) They may, for the same reasons disapprove the whole or any part of the sentence; and

(*d*) In case of findings and sentence being disapproved, as above provided, they may advise the division commander (or other convening authority) that he may lawfully order a new trial by another court.

(*e*) They may recommend clemency.

In the colonel's case we will assume that the principal questions presented to these civilian judges are "whether the evidence justified the conviction of willfull disobedience," or whether only "failure to obey orders" should be substituted as a finding. And, having this power to modify findings when, to use the language of Gen. Ansell, "the evidence is not reasonably sufficient to sustain the finding of guilty of the major offense," it must be held, I think, that they may weigh the evidence and apply the doctrine of "reasonable doubt" to the solution of all questions of fact. I would not necessarily reach this conclusion were I discussing the authority of any civil appellate court of this country to determine "errors of law" injuriously affecting the substantial rights of the accused. For no civil appellate court in this country has the extraordinary power to disapprove a finding of guilty or to substitute a finding of a lesser included offense.

I think that the phrase "errors of law," the existence of which call into exercise these extraordinary powers to disapprove and modify findings, must be construed in the light of these extraordinary powers; that it must be held to be an "error of law" when there has been error in weighing the evidence or in the application of the doctrine of the reasonable sufficiency of the evidence to sustain a charge; otherwise the authority to substitute a lesser and included offense in the finding would find such limited application as to make this authority of little value to the service.

Now, I have tried to state the application of the pending bill to the trial of a purely military offense and I think it sufficiently appears that its effect is largely to take away from military men the discipline of the Army and transfer it to civilians. That offends my

sense of what is right much more than it would if the proposition were to turn over to civilian control common-law and statutory felonies committed by persons within the Military Establishment.

In considering common law or statutory offenses, like manslaughter, robbery, embezzlement, and larceny, we get a different picture. The advisability of leaving questions of law, including the determination of weight of evidence and of the measure of punishment, to a subordinate law officer—the court judge advocate—rather than to a court composed of military officers is more apparent. These offenses are committed either against other members of the armed forces or against civilians. In both cases, as I understand it, the practice in England, in time of peace, is to turn over all such cases to the civil courts for trial. The practice in our country, in time of peace, is generally to turn over only the second class of cases to our civil courts for trial, and our code expressly provides for this. I mean where the person offended against is a civilian. It is more convenient in England than in our country, because of the scattered condition of our Army and the sparseness of our population relative to theirs. When the common law or statutory offense is committed by a soldier against another soldier it affects discipline of the command in a very direct way and, I think, the discipline of our Army would suffer to a very great degree if we adopted the policy of turning over all such cases to the civil courts for trial. As these cases do affect the discipline of the Army we should have to consider, as in a strictly military case, the disadvantages which would result from turning over to a subordinate law officer, usually without military training or experience, and to a court of military appeals consisting of civilian judges, the question of the measure of punishment. It is a subject to which I have given much thought without being able to devise any way of treating these two classes of cases separately; and, of course, they can not be separated in time of war.

I fear that it is an absolute necessity that the military jurisprudence should carry the burden of adjudicating and determining all of these offenses of a common law and statutory character.

I have not touched upon the anomaly that would result if, under this pending bill, the President were the convening authority. Assume that he has convened a court-martial for the trial of some high ranking officer in the Army. His duties would be limited to furnishing a panel and appointing a court judge advocate and a prosecutor, and so forth. The trial would proceed along the lines indicated, and when the case came in, a court of military appeals would determine for the President all the questions presented by the record. These questions might arise out of the participation of a division or a field army in a battle.

The idea of a civil court of military appeals is wholly untenable from my point of view. And so, too, is the idea of an exclusively military court of appeals functioning independently of the President in a case of the kind I have mentioned. I think it would affect in the most detrimental way the fighting efficiency of our forces. That seems to be the view taken by the Kernan-O'Ryan-Ogden Board. That board injects the question of the constitutionality of such legislation, which I have not mentioned because I am not prone to raise constitutional objections. I would prefer to see this question of appellate power settled on the ground of what is best for the

service and the fighting efficiency of our armies. I have in this review invited the attention of the committee to all articles in the pending bill which have to do with trials. By consideration of them you get a picture of the military jurisprudence that would be set up if the pending bill were enacted into law.

Senator LENROOT. If you have finished your review of the law, I will ask you some questions.

Gen. CROWDER. I have finished with that part of my statement.

Senator LENROOT. I want to ask you some questions, not at all in opposition to your construction of the bill, because I am inclined to agree with the construction you have given; but I do want to ask you some questions along this line; I am not going into the question of how the court of appeals, if one should be created, should be constituted now. If the jurisdiction of this court was limited to passing upon prejudicial errors and jurisdiction, but was in no sense permitted to substitute their judgment for that of the court upon the facts, to what extent would your objection still apply—not, now, going to the constitution of the court?

Gen. CROWDER. My objections would still exist, and for this reason: There is no jurisprudence that needs, so much as the military, an appellate review on both the law and the facts. I should hate to see an appellate review limited to jurisdictional and prejudicial errors alone, or what is sought to be designated in the bill as "errors of law." The original trial before a court-martial is necessarily summary, erroneous findings of fact are more probable and excusable than in plenary trials before petit juries in the calmness of county seats. I hope, sincerely hope, that it will not be the final judgment to create an appellate jurisdiction for the review of errors of law alone. I can not emphasize too greatly this view. Now in this other field of common law and statutory felony it may well be that a civil court of appeals would function more efficiently. Civilians would be better qualified to try such cases, not more than 14 per cent of the total, just as military men are better qualified to try the remaining 86 per cent of military cases.

Senator LENROOT. Yes.

Gen. CROWDER. I do not think, however, that a divided appellate power would be either practicable or wise. I do not think that anybody would be justified in asking for that separation of the powers unless he could prove that the machinery set up under General Order No. 7 had made errors. We have to-day a unified appellate jurisdiction under General Order No. 7, and nobody has appeared before you and asserted since that order went into effect there has been any injustice done except in the failure to handle questions of clemency. If the experiment has been successful in having the appellate jurisdiction consolidated that way, I can not help but say, "Why change?" In other words, I will always be able to command in my office qualifications of the highest character to constitute the board of review; always be able to deal with records that set forth every bit of evidence that is taken by the trial court; always be able to present to the Secretary of War, and through him to the President, whom we propose to vest with full appellate power, all the error there is, jurisdictional or prejudicial of law or fact. And if the system has worked during this war, I ask "Why change?" Let it be a question of fact. Has the machinery worked under General Order No. 7?

And if it has, if it does not appear that there is any complaint to make against the system, and it seems to have won the commendation of the American Bar Association after examining a large number of cases, then I say, "Why change?"

Senator LENROOT. As a matter of fact, General, under the prevailing system, while your office in practical effect is exercising this supervisory power, you have no jurisdiction to do so?

Gen. CROWDER. No, but we propose to create it in the present legislation.

Senator LENROOT. You propose to create it still in only an advisory capacity?

Gen. CROWDER. But to give the President the full power.

Senator LENROOT. Well——

Gen. CROWDER. Then again I come to this point. If there was any failure upon the part of the reviewing authorities and the President to respect the advice that we have given, it might be necessary to consider an appellate jurisdiction independent of the President and the reviewing authority; but has your attention been called to any? Four cases to the reviewing authorities below. Six cases where the Secretary of War, a civilian lawyer, has assumed to determine in the office above.

Senator LENROOT. You are proposing to grant to the President a reviewing authority not only upon the facts, not only general powers, but upon questions of law which you never expect him to exercise independently, and presumably he might not be qualified to exercise independently.

Gen. CROWDER. Neither is the President qualified to exercise command independently. He acts on advice of experts in matters of command. And I assume that the Judge Advocate General and the Secretary of War, his legal experts, will advise him in the exercise of this appellate authority.

Senator LENROOT. Yes.

Gen. CROWDER. And that he will follow their advice.

Senator LENROOT. That is the whole point. You are creating an appellate tribunal in name that you do not expect will independently exercise the powers that are given him.

Gen. CROWDER. No; I expect the President to exercise it upon a legal review prepared in the office of the Judge Advocate General. I have no objection to the way you state it, and I believe it will be 100 per cent effective.

Senator LENROOT. It may be, but I am stating the terms of the law itself.

Gen. CROWDER. Yes.

Senator LENROOT. In so far as prejudicial errors are concerned, I take it from your statement that you see in itself no objection to a properly constituted court. I am not speaking now of how the court should be constituted, but of a properly constituted court, of that power being vested that would not interfere with discipline.

Gen. CROWDER. Yes, although I am frank to say that I think it would interfere with discipline if such a court is superior to the President and able to overrule or conclude the President.

Senator LENROOT. Now, going one step further, as to the constitution of that court, supposing a court of appeals were created, a majority of whom should be military men, but a permanent court. What would you say?

Gen. CROWDER. First, and of minor importance, let me say that you would have to choose between such a court and the continuance of the office of the Judge Advocate General. Of course, with a court vested with that power, the Judge Advocate General of the Army would have little or nothing to do with military justice. Of course, there would remain his duty to render opinions connected with the civil administration of the War Department.

Senator LENROOT. He would have a great deal to do with military justice. He would have a large force under him.

Gen. CROWDER. The military justice would depend upon the court of appeals and not upon him at all.

Senator LENROOT. Would it not be very proper to have the judge advocate present them to the court?

Gen. CROWDER. Present the case?

Senator LENROOT. To represent the Government, so to speak.

Gen. CROWDER. Before that court?

Senator LENROOT. Before that court.

Gen. CROWDER. Well, that would mitigate the evil somewhat. But if you will permit me one other suggestion, I think you and I will have a complete meeting of minds. I can conceive of this appellate jurisdiction as you have outlined it, but it gives me some pause when I reflect upon the fact that what you propose is a completely new experiment which no great nation has heretofore ever attempted—and probably no great nation ever will attempt—except Russia. They have tried out your proposition in France. Their court of revision is composed wholly of army officers in time of war and in the theater of war, and of a majority of army officers under other conditions, but the President is authorized to suspend its functions in time of war, or in time of peace in a besieged area he can suspend this appellate jurisdiction. They have also given their President the right to create emergency war courts from which there is no appeal. Now, if the most advanced nation that has dealt with this appellate review has placed such qualifications upon a military appellate body like that, would it not be invading the field of untried experiment if we, by rigid statute law, operative at all times and under all conditions, either peace or war, should create an appellate court with absolute power to conclude the President and all commanding generals under him?

Senator LENROOT. That would go to the extent of whether our review would be given such a construction as in this bill, or a very limited power such as I have suggested. I am asking these questions to get your ideas upon it.

Gen. CROWDER. I am trying to speak moderately upon this whole experiment. I hope that it will not be the final judgment of Congress to set up a tribunal limited to a review of errors of law only. I hope that we will always have an appellate review on both law and fact. It would be a great mistake, it seems to me, to limit the appellate review, as it is limited in the pending bill, to questions of law; and I must admit that I can not define what is a question of law under the terms of this bill. It is something less broad, of course, than questions of law and fact. Something is excluded. Now, here we are with a jurisprudence that is older than the civil jurisprudence, with records of trials that contain every word that is uttered from the time the accused enters the court room until he leaves it—I hope

that it will not be the judgment of this committee to set up a limited review. We have got the whole review. The convening authority below can weigh both questions of law and fact when he comes to act, and so, too, should the President have this power.

Senator LENROOT. The reviewing authority, I quite agree with you, has full power to measure questions of fact; but again, the convening authority must rely upon a judge advocate when it comes to questions of law, and not exercise his own judgment.

Gen. CROWDER. Yes, he should.

Senator LENROOT. That is the difficulty for me.

Gen. CROWDER. But it has not proved a practical difficulty. In judging of the personnel of your proposed court of appeals, it is important to bear in mind that about 90 per cent of the cases coming before that court are military cases. It is unreasonable to assume that any but military men could judge of the weight or relevancy of the evidence in determining the conduct of a man upon the field of battle, where the evidence is strategical or tactical and wholly military. The issues are those which only a military man who has been trained in those matters can understand. How could a civilian understand and judge of the conditions of battle in the Argonne so as to fix responsibility for failure of a division or Army commander, or even a colonel of a line regiment?

Senator LENROOT. I am not speaking of a civilian tribunal. I put my final proposition, of a tribunal the majority of whom should be military men.

Gen. CROWDER. Even in that case the objection that I have previously advanced remains, that when we shut the President off from a final say in such matters, we impair his responsibility, as the constitutional commander in chief, for winning the war; and I feel very certain, if you pass a bill of this kind, that ultimately its constitutionality will go before the Supreme Court.

Senator LENROOT. On this question raised by the Kernan report?

Gen. CROWDER. I am very much afraid, if you undertake to shut the President off from his relations to the discipline of the Army, and shut off commanding generals under him from their relations to the discipline of the Army, by creating a court of appeal with power to conclude them all, that the constitutional question raised by the Kernan-O'Ryan-Ogden Board will ultimately come before the Supreme Court for settlement, and in a case which will be very embarrassing, because the case will be identified with some great national crisis. I have just that to say about the constitutional question.

Senator LENROOT. I have not heretofore expressed any opinion, but I must say that if the view of the Kernan report is correct, I think the sooner it is found out the better. If there is any such autocratic power vested in the President of the United States as commander-in-chief of the Army, beyond the control of Congress, we ought to know it. That is my view of it.

Gen. CROWDER. Well, I have not based my opposition on constitutional grounds.

Senator LENROOT. I know that you have not, at all.

Gen. CROWDER. I preferred to rest the whole question upon what is best for the Army.

Senator LENROOT. Yes, I understand.

Gen. CROWDER. And I am willing to assume the constitutionality of legislation of that character.

Senator LENROOT. Yes.

Gen. CROWDER. And my only purpose there was to say that I have no doubt in time of some great crisis, the constitutional question will arise.

Take the question of the President convening the court. I did not emphasize that in my application of the law. Suppose that he, instead of a subordinate commander, is the convening authority, and then consider the President submitting to a court judge advocate below, and to a military court of appeals here, the question of whether some field commander or some division commander or corps commander in the battle of the Argonne has failed to do his part.

Senator LENROOT. Well, that all goes to two questions. One involves, of course, the question of whether the Constitution applies at all, which you discussed somewhat, and, secondly, whether the President is governed not only by law but by common principles of justice—whether there are any limitations upon him. If there be such, I see no more reason why, upon questions of law, he should not be governed by a military tribunal as Commander in Chief; he certainly is, just as a civil officer is, by the very men that he appoints to the bench, and they control his action and find his action invalid in a given case.

Gen. CROWDER. Of course, everybody sees that point instantly upon its being mentioned; but what would be the effect in the end, I am asking, what would be the effect upon efficiency if the man he appointed would have the right to control and nullify his action as Commander in Chief?

Senator LENROOT. If he did not obey the law, if he violated the law, I do not know why he should not be subject, as Commander in Chief, to nullification of any action in violation of law.

Gen. CROWDER. I am afraid this question of military relations is sui generis and that it does not aid you much to invoke the analogies of our civil jurisprudence.

Senator LENROOT. Well, take this case: Under existing law, take th case of the President convening a court, as you suggest. Supposing that the President should undertake to convene a court in violation of the Articles of War. Do you not think habeas corpus would lie to a civil court?

Gen. CROWDER. Unquestionably; and when the privilege of this writ is not suspended it would be effective.

Senator LENROOT. Do you not think that the civil courts therefore, to that extent, would have the control of the action of the President, even though he is Commander in Chief?

Gen. CROWDER. Oh, of course.

Senator LENROOT. So that to that extent now the courts may control the action of the President as Commander in Chief.

Gen. CROWDER. Yes; controlled by habeas corpus, but as to jurisdiction only.

Before I conclude my testimony I wish to call the attention of this subcommittee to a matter and see what my responsibility is. If I stop here I shall leave many matters uncovered which this committee has admitted as in some way relevant, and most of them the accusa-

tions of a single witness, Gen. Ansell. Illustrative of the intemperate general character of these accusations, I cite the following as examples:

1. Against generals of the Army:

(*a*) "The weakest grade in the Army of the United States" (p. 121), which is the grade from which are drawn convening and reviewing authorities of courts-martial;
(*b*) "Many of them, jokes to everybody else in the world except ourselves and themselves" (p. 121);
(*c*) "Lacking in experience" (p. 121), citing Gens. Pershing and Wood as examples, and saying:
(*d*) "That heterogeneous collection of troops on the Mexican border" "which Gen. Pershing commanded"; "no professional soldier would ever call that a division" (p. 122); and "the command in the Philippines was not the kind of command that required general leadership" (p. 122); and again,
(*e*) "I have had a hundred times their court-martial experience" (p. 121).

2. Against the Inspector General:

(*a*) "Thoroughly reactionary" (p. 116); "the most reactionary of men"; "prejudiced and reactionary" (p. 173); "whose views savor of professional absolutism" (p. 123).
(*b*) With trying to browbeat and intimidate Gen. Ansell in connection with the investigation of Gen. Ansell's part in the present controversy; in trying to compel Gen. Ansell to make a statement against his will by threatening that "this thing is in Congress, and my report will go to Congress, and, Ansell, when it gets to Congress, it will be very detrimental to you" (p. 209).
(*c*) With habitually using the power of his office in connection with investigations to compel accused persons and others to make statements against their will and to incriminate themselves by menaces, threats, and intimidation (p. 209).
(*d*) With allowing officers in his department in camp and division to compel testimony from suspected or accused soldiers, and then use it against them (p. 209).
(*e*) With having taken part with the Secretary of War and the Acting Judge Advocate General (Gen. Kreger) in frequent conferences with the court-martial committee of the American Bar Association under such circumstances that "I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

3. Against Gen. Biddle, former Assistant Chief of Staff:

(*a*) "Thoroughly reactionary" (p. 116);
(*b*) Sharing with the Inspector General in views that "savor of professional absolutism" (p. 123).

4. Against Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col. Ogden—the members of the Kernan-O'Ryan-Ogden Board—and Lieut. Col. Barrows, the recorder of that board:

(*a*) "The most reactionary set of men in the United States" (p. 215).
(*b*) So prejudiced, and known to be so prejudiced, that many officers of high rank holding liberal views refused to express their views on military justice to that board (p. 215).

5. Against former President Taft—not admitted to the record, but illustrating the intemperate and irresponsible character of these accusations:

(*a*) Perverting "his power to the furtherance of a plan * * * to maintain the existing vicious system of military justice, and to do me great personal injury" (statement of Gen. Ansell, New York World, Sept. 16, 1919);
(*b*) Abusing "the confidence and trust of the American people" and "misleading them" (ibid.); and
(*c*) Debasing "his exalted position as ex-President of the Republic to become an ignorant and bitter partisan in behalf of his friend," Gen. Crowder (ibid.).

There is also a formidable list of accusations against the court-martial committee of the American Bar Association, but particularly against the Secretary of War and myself. The list is a long one. Certain of these accusations carry their own refutation.

Then there follows a long list of accusations against the Chief of Staff and against the chiefs of bureaus, and others.

Now, the question is how much responsibility do I incur by leaving unanswered charges that have been admitted by this committee to their record as in some way relevant?

It will protract the sessions of this committee a week if I answer fully all those charges.

Senator WARREN. Are you putting that as a question?

Gen. CROWDER. I am asking the question. I do not like to leave those things unanswered if the inference by Members of Congress is going to be that such a course admits the truth of any of them.

Senator WARREN. You enter a general denial?

Gen. CROWDER. Sometimes a little truth is interwoven with a lot of misleading, inaccurate statements, and made to serve all the purposes thereby of positive misstatement. The explanation to be made is rendered very difficult.

Senator LENROOT. I would suggest that Gen. Crowder place in the record anything he desires upon that general subject. Of course that is not the issue anyway before this committee. The only thing I assume is that the committee is charged with such recommendations to the full committee, as to legislation upon this subject, if there are any changes to be made. I think that in view of what has been said if you desire, the committee should hear you and give you the fullest opportunity; but certainly you should be given full liberty to place in the record anything you desire to.

Gen. CROWDER. Then I can put in these matters in the form of appendices. I will scan again the principal of those charges. Where I think they do not carry their own refutation, I will answer them. That was where I wanted your instructions. I could talk here for a week in regard to issues of fact that have been raised, and probably talk of what is relevant to those issues, but not at all relevant to the real issues before this committee.

Senator WARREN. I agree entirely with the Senator from Wisconsin, that there was no occasion for a great deal of that to go into the record; we have nothing to do with very much of that kind of evidence. All we have to do is just what the Senator says, to consider what is necessary—what changes are necessary, if any, in the present laws—and whether this bill or some other should be reported from this committee to the full committee and from them to the Senate. So that all of this other matter should have, in our consideration, nothing to do with the question before us of the necessity of reforming the law. But, on the other hand, I think you should have freedom to insert in the record anything respecting the issues that you consider relevant, because I know that you will not transgress.

Gen. CROWDER. I will avail myself of that permission and will insert such memoranda, as appendices, with a list or table of contents so as to direct the attention of the committee to any particular subject where there may be any question in their minds as to what the facts may be.

Senator WARREN. You will be able to conclude your testimony to-day, will you?

Gen. CROWDER. I have finished all that I care to talk about to-day. I will insert as an appendix the five or six different suggestions that have been made to you of courts of appeal. There are several bills pending. I will do that in order that you may have in the briefest

possible compass these alternative schemes, if that will be helpful; and I may add a few explanatory notes. There are two or three bills in the House and two or three in the Senate.

Senator WARREN. I think that is a point about which we can not have too much information.

Gen. CROWDER. If I can be of any further assistance to the committee on these points, or if there is anything I have not covered, I shall be very glad to do so now. This matter is one about which I am deeply interested.

The propositions before the committee, except those submitted by myself, Senator McKellar, and by the Kernan-O'Ryan-Ogden Board, carry appellate power further than it has ever been carried in the history of armies by any leading nation, and if you adopt them, you are a pioneer in that field.

Senator WARREN. Inasmuch as we have parallels before us from individuals, one from the Kernan Board, and a not quite complete parallel from the American Bar Association, would it be too much to ask the general to take his suggested amendments and put them in the form of a bill and submit them in parallel columns in the same shape as this print which we already have?

Senator LENROOT. I would be glad to have it.

Gen. CROWDER. May we have that made of record, that you desire me to put in the record my suggestions of amendments, just as a formal bill?

Senator WARREN. Yes. It could be gotten up in the form of an ordinary bill, or you could print it in parallel columns for comparison with the present Articles of War.

Senator LENROOT. If it could be done in that way, in parallel columns, it would be very much easier for us to use.

I wish, also, Mr. Chairman, that we might have a print of the Kernan report.

Senator WARREN. They printed it in the department, you know.

Senator LENROOT. We could have that Kernan report taken and put in this form of parallel columns with the present Articles of War.

Senator WARREN. Very well.

Gen. CROWDER. I brought to your attention the first day that I was testifying a quotation of Gen. Ansell, purporting to be from the language of the Supreme Court of the United States in the Grafton case, which language we have been unable to find in that case, and you called for the citation, Senator Lenroot. I ought, in justice to Gen. Ansell, to spread upon the record an explanation if anybody has been able to find that language which he attributes to the Supreme Court in the Grafton case.

Senator LENROOT. I do not want it. I was interested in giving the reference to the volume and page of the Supreme Court reports.

Gen. CROWDER. I do not like to leave the inference on the record that any man would attribute language to the Supreme Court which the Supreme Court had not used, if anybody is able to find that language; for, I am frank to say, if the Supreme Court ever used that language, I am out of court on that issue.

In concluding my statement before this subcommittee, I wish to make some additional comment upon the pending bill. In its fundamentals that bill is built upon a distrust of or lack of confidence in nearly every existing military authority, including the President of the United States, the Secretary of War, and also commanding

generals under them who are classified in testimony before this committee as "jokes;" it implies distrust of the many thousands of officers of the great Army we raised to fight this World's War, who participated in the administration of military justice by general, special, and summary courts. In this bill you are asked to brush aside the traditions of the American Army and build anew a jurisprudence bearing faithful analogies to the civil jurisprudence, notwithstanding the fact that, even in the decisions of the Supreme Court of the United States, it is recognized that the Army and Navy of the United States are emergency forces and require other and swifter methods of administering justice than prevail in civil jurisprudence, where normal conditions usually obtain and where, if normal conditions are disturbed, resort is had to the more expeditious military method.

The arguments by which this proposed new system has been supported are those of sensationalism—sensational appeals to American homes based upon alleged individual miscarriages of justice, and attributing to the officers who fought this war, and who were drawn from the same American homes as were the soldiers in the ranks, a tyranny which I, for one, do not believe characterized their attitude toward the men in the ranks.

Because I do not believe that Mr. Taft, of prolonged judicial experience, who lived his official life in the Philippines in such close contact with the Army and Navy, and who, as Secretary of War and President of the United States, had such direct relations to the administration of military justice in the graver cases, is a man to "debase his exalted position as an ex-President of the Republic to become an ignorant and bitter partisan" on this issue; because I do not believe that most of our general officers, who have acted as convening and reviewing authorities during the period of this world's war, are "jokes;" because I do believe that the sense of justice of the American people is fairly reflected in the lives and judgments of the officers of this great world army who have been drawn from American homes, and that they are not men thirsting for the lives and liberties and blood of the men in the ranks, I think that the pending bill, whose fundamentals are built upon this general view, should be rejected as a basis of legislation, and that we should proceed by way of amendment of the existing code to enact all of the reforms which our war experience has shown to be necessary.

I believe in safeguarding the administration of justice and I believe it can be done in a way consistent with winning battles and wars, which, I presume, it will be conceded is the primary purpose of maintaining armies. To this end I would strengthen the safeguards in the actual trials of men below; and above, would secure an adequate legal review of cases, on both the law and fact, and not on errors of law alone as is provided in the pending bill; but never in establishing such a review would I favor divesting the President of his present relations to the discipline of the Army, as is proposed in the pending bill, any more than I would favor divesting him of the command of the Army. Normally his control in both cases is exercised through subordinate officers; but under our system the authority is reserved to him in the graver crises of our National life to make his own control effective.

(At 1 o'clock p. m., the subcommittee adjourned subject to the call of the chairman.)

APPENDICES.

I. Senator Chamberlain's Charges Against Gen. Crowder.

(*a*) That the selective-service law, as originally drawn by Gen. Crowder and transmitted to Congress by the War Department, was of "Prussian character."
(*b*) That the War Department project of the selective-service law "evidences the hand of the military autocrat." That Gen. Crowder is at heart a military autocrat.
(*c*) That Col. Warren, and not Gen. Crowder, was responsible for the civilian composition of the selective-service boards.
(*d*) The Army and Navy Club incident: Gen. Crowder's refusal to acknowledge an introduction to Senator Chamberlain.

II. Gen. Ansell's Charges Against Gen. Crowder.

(*a*) Gen. Ansell's charge that he was relieved from all duties and responsibilities in connection with the administration of military justice after November, 1917.
(*b*) Gen. Ansell's charge that he was again relieved from all connection with the administration of military justice after the armistice.
(*c*) Gen. Ansell's charge against the administration of the Judge Advocate General's office.
(*d*) The alleged "propaganda bureau."
(*e*) Gen. Ansell's charge that Gen. Crowder failed to forward to the Secretary of War Gen. Ansell's report of his European trip.
(*f*) Gen. Ansell's charge that Gen. Crowder opposed granting counsel to accused, and giving accused legal protection at the trial.
(*g*) Gen. Ansell's charge that Gen. Crowder entertains and has expressed illiberal views as to appellate procedure.
(*h*) Gen. Ansell's charge that Gen. Crowder entertains and has expressed illiberal views as to accused's rights of challenge.

III. Attacks upon the Present System of Administering Military Justice and upon the Articles of War and the Revision of 1916.

(*a*) Alleged archaism of the Articles of War.
(*b*) Same subject: Alleged "archaism" of the present Articles of War.
(*c*) Court of military appeals: Gen. Ansell's statement that Gen. Sherman and Gen. James B. Fry, former provost marshal general, advocated such a court.
(*d*) Condemnation of the ninety-sixth article of war, the so-called "general article."
(*e*) Charge that General Order No. 7, War Department, January 17, 1918, prevented or hindered recommendations of clemency by the Judge Advocate General.

IV. Gen. Ansell's Inaccurate Statements.

(*a*) Concerning review of records of trial in the Judge Advocate General's office.
(*b*) That forfeiture of citizenship is entailed upon conviction by court-martial.
(*c*) Concerning the Camp Grant rape cases.
(*d*) Concerning the proportion of charges preferred, referred for trial, convictions, acquittals.
(*e*) Concerning statistics of court-martial trials for the year preceding the armistice.
(*f*) Concerning the special clemency board organized in the office of the Judge Advocate General.
(*g*) Concerning the same subject: Clemency board.
(*h*) Concerning the same subject: Organization of the clemency board.
(*i*) Concerning the effects of conviction by court-martial.
(*j*) Concerning the investigation of Gen. Ansell's accusations by the Inspector General

V. APPELLATE POWER: VARIOUS IDEAS SUBMITTED TO CONGRESS.

(a) Opinion of Attorney General Wirt, September 14, 1818.
(b) S. 3692 and H. R. 9164 (bill drafted by Gen. Crowder and submitted by Secretary of War, January, 1918).
(c) Proposed joint resolution prepared for Senator McKellar, February 20, 1919.
(d) Gen. Crowder's recommendation in his letter of March 10, 1919, to the Secretary of War.
(e) Kernan board report, July 17, 1919.
(f) S. 5320 (Chamberlain, January, 1919), H. R. 14883 (Siegel, Jan. 22, 1919), H. R. 15945 (Johnson, February, 1919), and H. R. 431 (Siegel, May 19, 1919).
(g) Senate joint resolution 18 (McKellar, May 20, 1919).
(h) S. 64 (Chamberlain, May 20, 1919) and H. R. 367 (Johnson, May 19, 1919).
(i) H. R. 9156 (Dallinger, Sept. 9, 1919).

VI. TABULAR STATEMENT OF THE ORGANIZATION OF BRITISH AND FRENCH MILITARY TRIBUNALS.

(a) Organization of British military tribunals, including the functioning of the British judge advocate general's office.
(b) Organization of French military tribunals, including French courts of revision.

VII. GEN. ANSELL'S ACCUSATIONS AGAINST OTHERS BESIDES GEN. CROWDER.

(a) Against the generals of the Army.
(b) Against the Inspector General.
(c) Against Gen. Biddle, formerly Assistant Chief of Staff.
(d) Against Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col. Ogden, the members of the Kernan-O'Ryan-Ogden board, and against Lieut. Col. Barrows, the recorder of that board.
(e) Against Brig. Gen. E. A. Kreger, Acting Judge Advocate General of the Army.
(f) Against former President Taft.
(g) Against the Chief of Staff.
(h) Against the court-martial committee of the American Bar Association.
(i) Against the Secretary of War.
(k) Against Prof. John H. Wigmore, dean of the law school of Northwestern University, former colonel in the Judge Advocate General's Department.

VIII. SUMMARY OF INSPECTOR GENERAL'S FINDINGS.

(a) Specific findings and detailed report to Secretary of War.

IX. GEN. CROWDER'S ATTITUDE TOWARD RETURN OF ACQUITTAL FOR RECONSIDERATION.

(a) Charge of Gen. Ansell respecting the return to court of acquittals.
(b) Same subject: Gen. Crowder's attitude.
(c) Same subject: Recognition and approval of the power.

X. COURTS-MARTIAL IN GEN. ANSELL'S COMMAND WHILE HE WAS A COMPANY COMMANDER.

(a) Summary courts-martial.
(b) General courts-martial.

I. SENATOR CHAMBERLAIN'S CHARGES AGAINST GEN. CROWDER.

(A.) CHARGE—PRUSSIAN CHARACTER OF THE SELECTIVE-SERVICE LAW AS DRAWN BY ME AND TRANSMITTED TO CONGRESS BY THE WAR DEPARTMENT.

Senator Chamberlain injected this wholly irrelevant issue into the discussion of the subject of "Military justice" in his speech of August 18, 1919, withheld by him for revision and published in its revised form in the Congressional Record of August 20, 1919 (p. 4338, et seq.). He recurs to this subject in his speech of October 6–7, 1919, withheld by him for revision and published in its revised form in the Congressional Record of October 11, 1919 (p. 7150, et

seq.). He pretends in this latter speech to be speaking from record proof and quotes from the selective-service law, as introduced in the House of Representatives on the 19th of April, 1917, the following paragraph:

That the President is authorized and empowered to constitute and establish throughout the United States tribunals for the purpose of enforcing and carrying into effect the terms and provisions of this act, together with such regulations as he shall prescribe and determine necessary for its administration. A majority of the members of each tribunal shall be citizens of the United States not connected with the Military Establishment: *Provided further*, That upon the complaint of any person who feels himself aggrieved by his enrollment or draft as is herein provided, any court of record, State or Federal, having general jurisdiction in matters pertaining to the writ of habeas corpus, according to local laws or by act of Congress, shall have jurisdiction, by proceedings in the nature of the writ of habeas corpus, to hear summarily and determine the rights of such person.

He leaves one to infer that the chairman of the House Military Committee (Mr. Dent) introduced the bill in the form in which the War Department had submitted it and then proceeds to criticize it by saying that it left to the Judge Advocate General the power to appoint the men who were to pass upon the qualifications of registrants, and adds the observation that if there were to be any appeal at all it was to be to the courts rather than to tribunals in the locality from which the registrants came.

Answer.—It is a sufficient answer to this attack of Senator Chamberlain to point to the fact that the provision against which he hurls his criticism is not to be found in the War Department project of the selective-service law, but is a provision formulated by the House Military Committee. I had no more to do with the preparation of this provision than did Senator Chamberlain himself. His quarrel—if he has one, which I do not concede—is, therefore, with the House Military Affairs Committee and not with me. I have verified the fact in conference with the Hon. S. Hubert Dent, jr., the then chairman of the House Military Committee.

(B.) CHARGE—WAR DEPARTMENT PROJECT OF THE SELECTIVE-SERVICE LAW: IT EVIDENCES THE HAND OF THE MILITARY AUTOCRAT. HE (GEN. CROWDER) IS AT HEART A MILITARY AUTOCRAT. (CONG. REC., AUG. 20, 1919, P. 4338.)

Answer.—Although it is impossible to perceive the relevancy of this issue to the subject of "Military justice," Senator Chamberlain has injected the issue into that controversy and made it the subject of a personal attack. If Senator Chamberlain had consulted his own files, he would have known how far afield he had been carried, and also that the War Department project was silent on the subject of how selective-service boards should be constituted, except in so far as section 5 of that project, authorizing the President to utilize the services of any or all departments, or any or all officers or agents of the several States, Territories, and the District of Columbia, in the execution of that act, foreshadowed the plan of the War Department to constitute local boards consisting of local officials to execute the law.

But while the War Department project was silent on that subject, except as above indicated, the War Department plan of execution was not. That plan was completed prior to April 10, 1917, of which fact there is to be found proof in an official record which had been made nearly two years before this charge of Senator Chamberlain was made.

I refer here to a statement in the report of the Provost Marshal General of December 20, 1917, page 9, where it is stated that the specific task of working out the details of the general plan of execution of the selective-service law was formulated and approved on April 10, 1917. To show conclusively and by the same kind of record proof that I contemplated decentralized local administration by local boards prior to any expression from Congress on the subject, I have only to quote from a letter confidentially communicated to the governors of the several States on April 23, 1917, and formulated some days prior to that date, the following paragraph:

> While the class from which soldiers are to come is to be segregated by draft, the law is careful to provide for avoiding the misery that war brings to dependents at home and for a choice of those whose military service the Nation most needs and whose civil and domestic service can best be spared. The important duty of making the selection from the drafted class can best be performed by a permanent board in each county composed of citizens who can be relied upon to execute this solemn function with even justice and with apprehension of its gravity. This board should control the process of selection from its earliest steps, and therefore it must supervise the registration. For the sake of uniformity, for the elimination of expense, and for further and self-evident consideration, it would be prescribed that this board be composed of the sheriff, who would act as its executive officer; the county clerk, who would be custodian of its records; and the county physician, who would serve as surgeon and pass upon the physical fitness of those who are selected for service.
> (See Report of Provost Marshal General, Dec. 20, 1917, p. 8.)

This would seem to be unimpeachable evidence that the War Department, not later than April 10 and before Congress had much opportunity to consider this legislation, had formulated that very plan of supervised decentralization which would place the execution of the law in close touch with the civil population. Undoubtedly Members of Congress entertained the same view. The fact that members of the House Military Committee entertained these views is amply attested in a series of hearings conducted by that committee upon the typewritten War Department project between April 7 and April 17. (Hearings on selective-service act before House Committee on Military Affairs, pp. 63–64, 93–95, 105, 120, 131–132, 156, 285, 301, 307.) In many places in these hearings apprehension is expressed by members of the committee against a Federalized draft, but I can speak positively only as to my own state of mind. I had never contemplated other than a decentralized draft executed by the people themselves. I have no doubt but that many Members of Congress entertained the same view. I did not borrow my idea from them, and neither did they borrow their ideas from me.

(c.) CHARGE—THAT COL. WARREN AND NOT GEN. CROWDER, WAS RESPONSIBLE FOR THE CIVILIAN COMPOSITION OF THE SELECTIVE-SERVICE BOARDS.

Senator Chamberlain says: Did Gen. Crowder come before the conferees to assist them? Not at all. It was recognized by some of the members of that committee, at least, that Gen. Crowder was not the man to undertake to popularize that measure. The man who was called into consultation was Mr. Charles Warren. * * * I am suggesting the fact that the man who was sent before the committee for the purpose of assisting in perfecting this bill and bringing the local communities into touch with the Military Establishment was a civilian lawyer of distinction from Detroit, Mich., as I have before stated; and I want to pay him the compliment of saying here and now that there never was a man who appeared before the committee who tried harder

to give to the country the best service that was in him, without fear or favor, and without any regard to what effect his course might have upon himself."

(Cong. Rec., Oct. 11, p. 7151.)

Answer.—Let the facts speak for themselves:

The House and Senate bills passed on the same day (Apr. 28, 1917); and on the subject of selective service boards contained the following provisions:

SENATE BILL.

There shall be created under the direction of the President local tribunals in the several States or subdivisions thereof, composed of the members of the local civil government, to decide all questions of exemptions under this act, and also all questions arising under the draft for partial military service or for including or discharging individuals or classes of individuals from the selective draft, which shall be made under the rules and regulations aforesaid, and shall also provide for an appeal tribunal.

HOUSE BILL.

That the President is authorized and empowered to constitute and establish throughout the United States tribunals for the purpose of enforcing and carrying into effect the terms and provisions of this act, together with such regulations as he shall prescribe and determine necessary for its administration. A majority of the members of each tribunal shall be citizens of the United States not connected with the Military Establishment: *Provided further*, That upon the complaint of any person who feels himself aggrieved by his enrollment or draft as is herein provided, any court of record, State or Federal, having general jurisdiction in matters pertaining to the writ of habeas corpus according to local laws or by act of Congress, shall have jurisdiction, by proceedings in the nature of the writ of habeas corpus, to hear summarily and determine the rights of such person.

Conferees were appointed on May 1. One of the tasks of the conferees was to adjust the portions of the bill dealing with draft boards. They met for that purpose sometime between May 1 and May 10. I was present at the meeting with Col. Warren when this particular subject was under discussion. Both House and Senate provisions were rejected and in lieu thereof was inserted the following provision, the basis of which was a regulation prepared in my office and an amendment introduced by Senator Kellogg (Cong. Rec., Apr. 28, 1917, p. 1475), which was likewise based on that regulation:

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards, and where in his discretion practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President.

Col. Warren, who had accompanied me to the conferees' meeting, went into Senator Chamberlain's private office, I think, while the conferees waited for him in the next room, and there adapted the phraseology of the regulation that had already been prepared in my own office to the form of statute law.

This first conference report went to the Senate on May 10 and the House on May 11. Thereafter two other conferences were ordered on the bill, but the subject matter of those conferences had nothing to do with the organization and composition of draft boards, the action taken at the first conference terminating that phase of the bill and resulting in the enactment of the provision last quoted.

Col. Warren will never claim that he had anything to do with formulating the office plan as to the constitution of these boards, as formulated as early as April 10, and announced in the confidential letter to the governors of April 23, 1917, and necessarily prepared several days prior to that date. My recollection is that it was complete on April 15, and I am certain that I submitted a completed copy of the letter to the Secretary of War not later than April 17. The assistance, if any, rendered by Col. Warren in expressing this part of the plan in the form of the regulation upon which the final provision, agreed to by the conferees, was based, is not clear in my mind. The records show that he did not report for duty until April 27, 1917. I share with Senator Chamberlain the high estimate he expresses of the ability of Col. Warren. That officer would, I apprehend, be quick to disclaim that he in any way participated in framing the confidential letter to the governors of April 23, 1917, which laid down in such clear and unequivocal terms the exclusively civilian and ex officio character of the local boards.

(D) CHARGE—ARMY AND NAVY CLUB INCIDENT.

In his speech of August 18, 1919, on "Military justice," above referred to, Senator Chamberlain, in a personal attack upon me, used the following language:

> When anyone dares indulge in criticism of this system of military justice—or shall I say injustice—Gen. Crowder shows the same Prussian bent of mind. I dared criticise and drew upon my innocent head his unreasoning wrath. A short while ago I happened to pass him engaged in conversation with a distinguished member of the Military Affairs Committee of the House. The latter stepped up and greeted me cordially. The former did not even turn in acknowledgment of an introduction to me, thus proving both his entire lack of good manners and his resentment of criticism of what he stood for. * * * I had no regrets over the incident. * * * It simply illustrated * * * the character of the man, who might, if he had seen fit, have alleviated the suffering and humiliation that fell to the lot of thousands of American boys. He brooks no criticism. He allows no differences with him. He must be supreme (Cong. Rec., p. 4338).

Answer.—Did I refuse to acknowledge an introduction to Senator Chamberlain (whom I had known rather well, and I might say, intimately, for several years) because of any criticism he made of the existing system of military justice; or did I refuse to acknowledge an introduction because of very severe personal criticism?

Senator Chamberlain well knows that our personal and social relations continued unimpaired long after December 30, 1918, on which date he arraigned the department of military justice in a speech in the Senate. They certainly continued pleasant down to and including the hearings before the Senate Military Affairs Committee on February 26, 1919. Senator Chamberlain knows, or ought to know, that the incident which terminated our social and personal relations was not any criticism that he had uttered against the military code nor any difference of view between us as to the existing system of

military justice, but was the publication by him of an interview in the public press of the country on March 6, 1919, pronouncing my official statements in a communication to the Secretary of War which the Secretary of War transmitted to him, as not only "erroneous," but "false." I insert here one of the copies of this interview of Senator Chamberlain:

[From Washington Times, Mar. 6, 1919.]

CROWDER FALSIFIER, SAYS CHAMBERLAIN.

Another chapter in the controversy between Congress and the War Department over the general question of military justice was added last night by Senator Chamberlain, chairman of the Military Committee in the last Senate, in a statement declaring that "erroneous and false" statements were contained in the reply of Maj. Gen. Crowder, Judge Advocate General, to the Senator's address in the Senate last December.

Senator Chamberlain also sharply criticized Secretary Baker, declaring he had "permitted himself to be guided by the reactionary elements of the Army." Referring to the correspondence between Mr. Baker and Representative Gould of New York regarding Brig. Gen. Ansell, former Acting Judge Advocate General, who recently testified before congressional committees concerning court-martial cases, the Senator said the Secretary's next step would "be to reduce the rank of Gen. Ansell," and added:

BAKER CRITICIZED.

"No man who is not wholly impervious to the inhumanity in the court-martial system and to the opinion of the country could not only refuse to change the conditions but also punish the man who is responsible more than anyone else for the conditions being made known and for such steps as have been taken by the military authorities to change and correct them."

Gen. Crowder's letter replying to Senator Chamberlain was placed in the Congressional Record last Monday by Representative Lunn, of New York. Accompanying it was a letter from Mr. Baker saying the general's reply had been sent several weeks ago.

Admitting that he received the letter, the Oregon Senator said it "contained so many misstatements of fact that I hesitated to make it public, because I did not care to embarrass the Secretary by having him stand sponsor and be responsible for such erroneous and false statements in an official communication to the Senate of the United States."

SPECIFIC CASES CITED.

Senator Chamberlain discussed the case of a soldier on military duty found in a shop at night and sentenced to a long term of imprisonment. The soldier claimed that he had entered, thinking a robber was in the place.

"Gen. Crowder," said the Senator, "says nothing about the court-martial first acquitting this soldier and subsequently reversing itself and finding the soldier guilty and imposing a long prison sentence. He simply states 'that the accused soldier's story was disbelieved and he was found guilty.' This statement is wholly incorrect. I have read the record and he apparently has not."

From and after the publication of this interview my personal and social relations with Senator Chamberlain ceased. Shortly after March 6 I left Washington for Cuba on a prolonged period of detached service, and I did not meet Senator Chamberlain until the latter part of May, when this Army and Navy Club incident occurred.

Scanning closely the quoted language of this interview, it will be observed that Senator Chamberlain characterized the statements of my letter of February 12, 1919—41 closely typewritten pages—as containing "erroneous and false statements in an official communication to the Senate of the United States." The Senater neither in this interview nor at any other time has ever called attention to but two specific statements in that letter. The one was my failure

to note in this letter of February 12, 1919, in the discussion of a single court-martial case, the fact that the original finding of the court had been "not guilty," but that on revision the court had changed this finding of "not guilty" to a finding of "guilty."

It is true that the first draft of my letter of February 12, sent to Senator Chamberlain, omitted any mention of the changed finding of the court from "not guilty" to "guilty," but it is likewise true that this was noted the next day by me and a corrected copy sent to the War Department for transmission to Senator Chamberlain.

It is also true that eight days before Senator Chamberlain gave out this denunciatory interview, namely, on February 26, 1919, I specifically called his attention to the correction in my letter of February 12, 1919. (Hearings before Senate Military Affairs Committee on S. 5320, 65th Cong., 3d sess., p. 282.)

It is also true that on March 4, 1919, two days before the appearance of this denunciatory interview, my said letter of February 12 was published in the Congressional Record in its corrected form. (Cong. Rec., Mar. 4, 1919; pp. 5257–5265.)

The unquestionable fact is, therefore, that on March 6, 1919, Senator Chamberlain gave out this denunciatory interview branding the statements in my letter of February 12 as "erroneous and false;" and that on that date he referred to this omission above set forth as an example of "wholly incorrect" statement, although he had three prior notices, two of them personal notices, that this "wholly incorrect" statement, had been admitted by me and promptly corrected.

The other criticism that he made of my letter of February 12 was that I had there stated that the judge advocate on the camp commander's staff (Lieut. Col. William Taylor) who had passed on this same case was a civilian lawyer, fresh from civil practice. As a matter of fact this judge advocate had entered the Army from civil practice during the Spanish-American War. In the rush of preparing the data for my letter of February 12, Lieut. Col. Taylor had been confused with Maj. Orville Taylor, a Reserve Corps judge advocate, who had just entered the service from civil life. This error was noted by me the very next day (February 13) and corrected in the revised letter of that date. And on February 21 the Secretary of War, at my request, notified Senator Chamberlain by letter of this error and called attention to the correction. Indeed, it is doubtful whether Senator Chamberlain would ever have noticed this error at all had it not been for my open admission and voluntary correction of it. This erroneous statement did not appear in the letter of February 12 as published in the Congressional Record of March 4. Yet in spite of the fact that, apparently, Senator Chamberlain did not discover this error until the Secretary of War called his attention to it, at my request, and in spite of the fact that he knew the correction had been made at least 13 days before his statement appeared in the press on March 6, he described my letter as containing "so many misstatements of fact" that he did not make it public because he did not care to "embarrass the Secretary by having him stand sponsor and be responsible for such erroneous and false statements."

Senator Chamberlain, at the time of his speech in the Senate, August 18, had had in his possession my letter of February 12 for a period of over six months. He has entered the general allegation of "erroneous and false statements," but he has never, so far as I know, particularized but two, and those two are fully explained above.

II. Gen. Ansell's Charges Against Gen. Crowder.

(A.) GEN. ANSELL'S CHARGE THAT HE WAS RELIEVED OF ALL DUTIES AND RESPONSIBILITIES IN CONNECTION WITH THE ADMINISTRATION OF MILITARY JUSTICE AFTER NOVEMBER, 1917.

Gen. Ansell's letter to Congressman Burnett, February 17, 1919, (Cong. Rec., Feb. 19, 1919, p. 3982.) Gen. Ansell's testimony on the hearings on S. 64 (p. 173).

Gen. Ansell wrote to Congressman Burnett:

> Thereupon (upon filing the brief as to the meaning of the word revise as used in R. S., sec. 1199) I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting military justice.

He testified before this subcommittee:

> After I had filed my opinion insisting upon subjecting courts-martial to legal regulation, in November, 1917, the Judge Advocate General of the Army came back, took charge, relieved me from all connection with military justice, except, of course, when he was away for any period some one had to act, and I acted; but I mean to say that I was relieved of all authority to act while he was there. (P. 173.)

Answer.—The truth is to the contrary, that Gen. Ansell continued his duties in connection with military justice after November, 1917, and until his departure for Europe in April, 1918, as senior assistant in the office, in the same way and with the same responsibility as prior to November, 1917.

Col. E. G. Davis, during that time chief of the military justice division of the office, testified on the hearings on S. 5320 before the Senate Military Affairs Committee on February 26, 1919 (p. 204):

> That statement (Gen. Ansell's statement in his letter to Congressman Burnett, above quoted) "is not correct, for the reason that all these cases continued to pass through his hands. He signed many of them himself, as acting Judge Advocate General, and actually exercised the discretion of deciding what, if any, of the cases went on to Gen. Crowder for his action. Gen. Ansell exercised final authority on such cases during November, December, January, February, and March, except where he did not want to take the responsibility of determining a particular case himself.

The Inspector General of the Army, after examining officers connected with the military justice division of my office during the period in question and the reviews of the courts-martial cases prepared during the period from November, 1917, to Gen. Ansell's departure for France in April, 1918 (finding over twice as many signed during that period by Gen. Ansell as by Gen. Crowder), said in his report to the Secretary of War, May 8, 1919 (p. 26):

> From the records and from all obtainable evidence it appears that Gen. Ansell's statement that from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts.

An examination of the records in my office shows Gen. Ansell's signature appended to 105 written reviews of general courts-martial cases, dated between November 16, 1917, and April 9, 1918, as against 36 signed by Gen. Crowder. The balance, 436 in number, cases of less importance, bear the signature of Col. Davis or his assistant Lieut. Col. Clark.

(B.) GEN. ANSELL'S CHARGE THAT HE WAS AGAIN RELIEVED FROM ALL CONNECTION WITH THE ADMINISTRATION OF MILITARY JUSTICE AFTER THE ARMISTICE.

Gen. Ansell's testimony before this subcommittee (Hearings on S. 64, p. 183).

Gen. Ansell said:

After the armistice the Judge Advocate General returned to the office and more largely assumed the reins, and the first thing that the Judge Advocate General of the Army did again was to relieve me from all contact with and supervision over military justice. The truth of the matter is, of course, that he and the department did not like my liberal views. They will not say it, but their conduct speaks far louder than any words.

Answer.—The truth of the matter is quite to the contrary. On resuming charge of the office obviously a division of the work between Gen. Ansell and myself became necessary in the interest of expedition of business and a proper division of the burden. In order to get quickly in touch with the much assailed department of military justice, I gave directions that court-martial records be routed direct to my desk and other matters direct to Gen. Ansell's desk; but I never failed to send to him important records for his opinion. In addition (1) Gen. Ansell was made president of the clemency board, a matter of the very first importance in which he was greatly interested and which necessarily absorbed his time; (2) Gen. Ansell remained senior assistant in the office, upon whom devolved the duty and responsibility for all matters relating to military justice, as well as to other matters in the office whenever Gen. Crowder was not personally present, and, even when Gen. Crowder was personally present, Gen. Ansell remained in charge of more important disciplinary matters; (3) this relation continued undisturbed until after Gen. Ansell by his unwarranted personal attacks in his letter to Congressman Burnett, published February 19, 1919, had created an impossible situation; (4) Gen. Ansell himself said of this matter while it was fresh in his mind, in his testimony, February 15, 1919, before the Senate Military Affairs Committee, in the hearings on S. 5320 (p. 146):

An order was published routing all matters affecting military justice through other channels * * * maybe 10 days ago, I imagine. But I think it ought to be said that there is always a question as to what work is going to come to me or through me, and it was well within the province of the Judge Advocate General to decide such a matter, without any desire whatever to prevent my supervision of the administration of military justice. I do not believe that the publication of the order by the Judge Advocate General was designed to prevent my supervision of the administration of military justice, but rather done in the due course of administration and the division of work.

As to Gen. Ansell's statement that "he and the department did not like my liberal views," (1) Gen. Ansell held many views with which I did not concur; I did, however, appreciate his ability and energy. Although his views were well known to me, I retained him as my senior assistant in charge of the office in my absence; (2) my high opinion of his ability and my liberal attitude toward his differing views were testified in the order issued a few days later (G. O. No. 18, War Department, Jan. 27, 1919), upon my recommendation, awarding Gen. Ansell the distinguished service medal, which, condensing the substance of my letter of recommendation, awards him the medal "for especially meritorious and conspicuous service as Acting Judge Advocate General of the Army, whose broad and constructive interpretations of law and regulations have greatly facilitated the conduct of the war and military administration."

(C.) GEN. ANSELL'S CHARGES AGAINST THE ADMINISTRATION OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

Gen. Ansell says:

If there was ever one institution in the world that really ought to be thoroughly investigated, in my judgment, it is the Office of the Judge Advocate General of the Army. (P. 162.)

Injustice reigns supreme in the bureau of military justice itself. (P. 162.)

The Judge Advocate General's department is no longer a place of certain and assured justice. All too frequently it is a department given over to base wrong and tyranny, and the oppression of the men and officers who serve in it, and of the Army at large.

I am going far enough into this question of administration to show, I think, that justice is jockeyed around in that department, and it has been degraded to serve the personal purposes of an imperious master, the Judge Advocate General himself. (P. 172.)

Answer.—This language contrasts strangely with the gratuitous statement made by Gen. Ansell as late as July 8, 1918, and contained in the report of his trip abroad, as follows:

In passing, I should like to say and considering the nature of this report I think that with entire propriety I may say, that as a result of my observations and study here I have been surprisingly struck with the prevision with which the Office of the Judge Advocate General of our Army has been administered for the past several years, including the period of this war. Without particular opportunities for so doing, and without the advantage of actual war experiences had here, it has anticipated necessities of administration which as a rule only experience develops; and, more remarkable still, there is a surprising consonance between the principles of administration which our office had recommended to be adopted and which doubtless in the end will be adopted in the department and those principles which are found to be an approved basic part of the military administration of the allied nations.

As to this matter the Inspector General found (Inspector General's report of May 8, 1919, to the Secretary of War, p. 57):

It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose.

I should welcome an investigation of my office. I think I may confidently rest upon the record it has made.

(D) CHARGE.—THE ALLEGED "PROPAGANDA BUREAU."

Charge.—The following excerpts appear in Gen. Ansell's testimony before the Senate committee.

Mr. ANSELL. They met, these three men, and they decided upon a plan of campaign to maintain and defend the existing system at all costs and discredit the complaints and destroy the complainants. (P. 166.)

Senator CHAMBERLAIN. Who were the men? You mentioned them a while ago. (P. 166.)

Mr. ANSELL. They were Mr. Baker, Gen. Crowder, and Prof. Wigmore. The first thing done publicly was a statement for the press, devoted largely to discrediting me. * * * Now, they got together and published this document accusing me of wanting to succeed, and wanting to succeed by surreptitious methods, and gave it to the papers—the Associated Press and all of them—all timed for the usual Monday morning fulmination. It had been held there two or three days and sent out everywhere, with great headlines, about me. All of this was done by the Secretary of War, who invited it by writing a letter to Gen. Crowder as a vehicle upon which this letter to Gen. Crowder could travel. He said, "Please make the statement immediately." And the statement was made immediately that the system was splendid; that it had virtues that few human institutions have; and then it devoted itself largely to destroying me for bringing to the public, as I have had to do, the situation. And then, not content with what they gave to the press, but in accordance with the plan, they published this 70-page document here, which was an elaboration of the statement that was given to the press, in itself a long one, written by Prof. Wigmore. (Pp. 166–167–168.)

This conference between the Secretary, Gen. Crowder, and Prof. Wigmore that I told you about, established a propaganda bureau, in which Prof. Wigmore was the chief. There were several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries. (P. 168.)

The bureau got out this very elaborate statement, which is devoted to encomiums upon the system, and then concludes, as the other did, by calling the attention of the public to my surreptitious conduct, adding here another gross example of "surreptition" (p. 168).

That lengthy pamphlet was gotten out. There were 90,000 copies of this pamphlet published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this system and to discredit those who would attack it. I wish to say to you, Mr. Chairman, that the records of the cases cited will prove that the Secretary of War and the Judge Advocate General of the Army have resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation (pp. 168–169).

Answer.—These several quoted statements, in so far as they charge me with any part in this propaganda work, are wholly untrue. I had no more to do with it than did Gen. Ansell and Senator Chamberlain, both of whom have accused me of a leading part in it: More than that, in a conference with the Secretary of War, held between March 10 and March 14, when we had this so-called Wigmore letter before us, it was expressly agreed that the letter should be placed upon the files of the War Department as a complete refutation of charges made, and to limit publication to what is found in my letter of March 8, published in Official Bulletin of March 10, and I left for Cuba on or about the latter date with that firm understanding. It was not until April 4 that I learned of the large publication and distrbution of this letter. I was then at Habana, Cuba; and perhaps the best proof that I can give of my attitude toward this whole matter is by inserting here a letter which I wrote of that date to Gen. Kreger, who was representing me in the office.

FIFTH FLOOR, ROBINS BUILDING,
Habana, Cuba, April 4, 1919.

Personal and confidential.

MY DEAR KREGER: I am in receipt of a personal letter from Maj. Miller this morning dated March 29, inclosing copy of a public document issued out of the Government Printing Office, same being a reprint of my letter of March 10, 1919.

The matter of publishing this letter came up before I left Washington when I learned that a copy of it was in the hands of the Secretary of War before I had read it, being left with him by Col. Wigmore. As you know, the letter was prepared by Wigmore and Rigby, but largely by the former. Wigmore and I had a rather unpleasant conversation about his action in going direct to the Secretary of War with this communication. I think I remember the facts correctly. Wigmore told me that he had won the assent of the Secretary of War to its publication and distribution. I told him that such a step would be such a departure in military administration that it was not to be thought of, and that the expenditure of public funds for such a purpose could not in my judgment be defended. I expressed a doubt as to whether the auditor would pass the voucher for the publication of the letter for such distribution. Wigmore acknowledged the irregularity of his action in going over my head to the Secretary but expressed the view that he could not sit by and see the case fail for lack of presentation to the public. I would not yield my assent to publication and left Washington with the facts just as I have stated. I hope I am not dim in my recollection of the occurrences I have attempted to narrate.

In view of what I have stated, you will understand my surprise to receive this pamphlet and a statement by Miller that a hundred thousand copies were being mailed by the Provost Marshal General's Office; where they got their mailing list I do not know.

Had I been present in Washington I should have strenuously opposed the publication, if for no other reason than the events which have occurred since I left Washington furnish; namely, the refusal by the Secretary of War to give Gen. Ansell's letter of reply to my letter of March 8, published in the Official Bulletin March 10, any publicity. Now comes along this publication, which involves some reiteration of what

I said in the other letter and is certain to aggravate the situation both within the department and before Congress and the country. It insures, in my judgment, a turmoil for the next six months or a year.

Had I been compelled to yield my assent, I should have asked for the elimination of the part commencing "As to the second point," on page 53, and ending on page 62 with the second paragraph of that page, with, of course, those modifications in the remaining part of the text necessary to conform that part to this elision. Published in that way it would have been a straight explanation of the system of military justice, with recommendations as to what improvements ought to be made, and nothing more. The inclusion of the 10 pages, the elision of which I would have made, presents the personal issues and impairs the primary use of the document.

I thought I would like to have this explanation in your hands for your own guidance in answering any questions that may be directed to you. I hope I have stated the facts in all fairness to Wigmore.

Very truly, yours,

E. H. CROWDER.

Brig. Gen. E. A. KREGER,
Room 606, Mills Building, Washington, D. C.

E) GEN. ANSELL'S CHARGE THAT GEN. CROWDER FAILED TO FORWARD TO THE SECRETARY OF WAR GEN. ANSELL'S REPORT OF HIS EUROPEAN TRIP.

Charge.—Gen. Ansell said in his letter February 17, 1919, to Congressman Burnett (Cong. Rec. Feb. 19, 1919, p. 3983):

Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our Allies, I filed with the Judge Advocate General a report, which, among other things, treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War.

Gen. Ansell repeated this charge before this subcommittee (p. 174).

Answer.—In truth Gen. Ansell's orders to proceed abroad did not contemplate any examination of the administration of military justice. He himself wrote every order that he received. The convincing answer, therefore, may come from the official record he himself has made. His first letter on the subject of his trip was written as early as July 25, 1917. Certainly his orders gave me no information that his report was any broader than the instructions he had written for himself, and which I had approved, and therefore no information that it had any relevancy to the administration of military justice. This information came to me when I was accused of the suppression of that report. I then sent for the report, which I had never seen. After some delay a carbon copy was brought to me. I asked for the original. This was, after even greater delay, brought to me with the statement that it was found on Gen. Ansell's desk.

I submit herewith all I can find on the files respecting this trip abroad of Gen. Ansell, in order that the committee may form an independent judgment as to the extent to which I was apprised that it dealt at all with the subject of military justice:

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, July 25, 1917.

Personal memorandum for the Secretary of War.

Especially at this time—and I am sure you will agree—it is the plain duty of a subordinate to make to you such suggestions based upon his daily experience and observation as will help in the better administration of the department and to a more efficient Military Establishment.

In the performance of my daily duties in this office during this war I have met with certain deficiencies which doubtless have considerable effect upon general mili-

tary administration and which, if I do not exaggerate them, we must, as we can, readily remedy. I shall summarize the several and rather unrelated subjects thus:

1. The failure of this office primarily, the War Department, and the entire Government to inform itself and act advisedly in the light of the war law and administration of Great Britain, Canada, and France.

2. The failure of the War Department to appreciate the legal relation of this bureau to all military administration as the same is established and required to be recognized by law.

3. The unfair and injurious attitude of the department to the personnel of this bureau.

I. Long before we entered this war I took up with the head of this office the necessity of our keeping in touch with the war legislation and administration of Great Britain and Canada especially, and of France as well. At that time we contented ourselves with a rather perfunctory and unstimulated effort. I gathered some things through the State Department, and spent several half days down in the Library of Congress, and, through friends in the large universities, got in touch with university current library literature upon this subject. Since that time, in a perfunctory sort of way, I have kept up, through British law notes and like journals, with the general commentaries upon such law and administration. We are now in the war, and doubtless will have to consider, if not adopt, a course of law and administration parallel to that of our English allies, and should give thorough consideration to the much more scientific and effective effort of the French. If it were important for us to keep in touch with such national activities before we entered the war, it is imperative that we do so now. Doubtless the war law and administration of certain of the allied countries—particularly Great Britain, and to a lesser degree France—can be found in the Congressional Library and other sources of information in this country, and with considerable labor be gathered together and some estimate made of the whole. This gathering of the material, however, would be uncertain and unsatisfactory, and would give us no information of the effects of the legislation. Much of what has been done has been tried, tested, and found wanting, and much practice and experience have proved good. Assuming that we can produce the various parts of the legislation, of its effects there is as yet no literature which is authoritative, complete, or assuredly impartial. We ought to know this law and administration, the necessity back of it, its purposes and objects, and, above all, its results.

Now our Government must necessarily embark on many similar projects, or must at least consider them, and it should do so advisedly. I feel that the entire country is deficient in this knowledge, and that this great war-making department is almost inexcusably so. This department in this regard is not performing the functions that it ought to perform and will have to perform before this country participates effectively in this war. The chief fault is that as a nation and as a department we are proceeding along the old established lines that wars are to be fought by hosts specially trained therefor, and involve only indirectly and remotely the Nation and society at large. This was once so, but is so no longer. One or two or more millions of men can not be put into the field without profoundly disturbing social, economic, and industrial conditions, and this general disturbance is as much a matter of concern to this department as is the conduct of technical military affairs themselves.

A thousand and one questions ought to be considered, and this department should be ready with helpful views and advice. Indeed, we hardly know what the subjects are. We can summon to our minds a few of them which are likely soon to become subjects of consideration in this country—such as moratoriums for those engaged in the military service; separation allowances; government care of dependents; a scheme of insurance to supplant the unscientific American pension system; military requisitions of all kinds; control of telegraphs and telephones; suspension of freight and passenger traffic; control of resident aliens; press control; control of infectious diseases; the support of nonemployed; food conservation; judicial process as affecting those in the military service; trading with the enemy and suspension of private commerce with them; litigation and adjustment of judicial work to the situation of war; and a thousand and one phases of the problem of adjusting ordinary civil rights to the law and military exigency.

I say this department is not at all familiar with the conduct and experience of the other belligerents in these matters. We ought to be. This office particularly ought to be. I feel the need of such information every day. Though we are in the war, in some respects we are as far removed from it as Mars. We are not abreast of war activities; we lack current knowledge and information which is easily obtainable; we have not the facts which can serve as the basis of views that are worth while. We can not rely upon past experience; this war is sui generis, and must be understood as such.

I believe that the quickest and best way of getting these facts is to send several trained officers and investigators to London, Paris, and Ottawa, who should acquaint themselves with what has been done and get the opinions as to the merits of the various legal and administrative steps taken. In this way local color, atmosphere and public opinion will all register their effects. Such a commission should stay, I should say, a month in London, living in and with the administration that is there taking place, and perhaps a lesser time in Paris and Ottawa. They should then come back here prepared to state the facts with respect to the law and administration taken by the allied countries to our own Government, and to express informative and valuable views upon them.

I have talked over this subject with Maj. Wigmore, of this department, and as well with the Judge Advocate General himself. I think both agree with my views. Maj. Wigmore took the matter up with the Librarian of Congress, and has a letter from that authority, which I here quote:

"MY DEAR MAJOR: I was interested in your inquiry this morning, but impressed anew by the situation and the need which it reveals. What your office wants is, first, of course, the war legislation enacted in foreign countries, but also, secondly, the effects of this legislation.

"Now, as to certain of the countries, particularly Great Britain, and to a lesser degree France, we can produce the legislation, but of its effects, there is, as yet, no literature in our possession which is authoritative, complete, or assuredly impartial. An occasional article in a periodical, to be sure, on some particular phase; but with what bias composed can only be guessed.

"Now our Government is necessarily to embark on many similar projects of legislation or, at all events, to discuss them, and Congress will undoubtedly demand information not merely as to the legislation actually enacted abroad, but as to its effects, and it will not be content with a mere characterization of these as 'good' or 'bad.'

"Later on, studies and conclusions will doubtless appear in print, which will be adequate for the historian, but our legislators can not wait for their appearance. I believe that the one sound and practical method is to send a commission abroad to make some first-hand studies (see note [1]) and direct inquiries. An attempt to secure the data through our embassies or consulates, especially if based upon careful questionnaire, might yield some useful return, but any attempt at long distance and by correspondence merely, which rested solely upon the regular staff at these already overpressed offices, is not likely to yield adequate results. The inquirers themselves should be men with special training. Only such men have sufficient familiarity with the literature, the way of using it, and the method of formulating the inquiry. Only they could get at the essentials in the short time available, and could avoid being clouded by the nonessentials.

"There must be many such men available from the universities, at least between now and October 1, who are only too anxious to do some war service. They could readily be drafted in for it.

"I have been induced to note the above because, though your inquiry this morning is the actual occasion, we have already, during the months past and from various angles, had ample proof of the need.

"In determining the field to be covered, however, and the qualifications desirable in the investigator, there should not be overlooked any projects underway in other Government establishments—for instance, the Department of Commerce, the Department of Agriculture, the Tariff Board, etc.—whose object may be the acquisition of data within the section of the field with which their activities are concerned.

"Faithfully, yours,

"HERBERT PUTNAM, *Librarian.*"

I also quote one to me from Maj. Wigmore, as follows:

"I visited the Congressional Library this morning. Here is the book (my own copy) of which I spoke to you. The Congressional Library contains the same, with Volumes II and III also to 1916. Also the Library has a different series covering the same ground to 1917, in 14 small volumes. Also it has the English Manual of Emergency Legislation in serial parts to 1916, followed by a new series, of which one volume is now on hand, entitled 'Defense of the Realm Act and Regulations Thereunder.'

"Neither for France nor for England are there any treatises or reports on the effect of such legislation.

"I consulted my old friend, Herbert Putnam, Librarian; and he stated that he has for some time been convinced that such a mission as you propose should be sent. He is writing me a memorandum about it to hand to you.

[1] NOTE.—Not necessarily elaborate first-hand studies in the field, but studies of data which might be secured by direct contact with the operating bureaus of the Government.

"Also I lunched with Ambassador Spring-Rice at the Cosmos Club, and asked him whether he knew of any reports on the effect of the British legislation. He did not. His opinion was that the only way to learn the facts would be to send an agent to inquire, first, however, equipping him with a definite series of questions on which it was desired to ascertain the conclusions of English experience."

With my present information I can only see the task in vague outline, but I am absolutely assured of the advisability, even necessity, of undertaking it. I am also convinced that it is too big a task for one man, and that, as suggested by Mr. Putnam, trained investigators and skilled legalists should be called to our assistance.

In proceeding to the work, first the grounds here at home should be covered. That will enable one to get a comprehension of the task and to gather points to which he will direct his inquiries. Then the commission should take to the field, by which I mean should take up its investigation in London, Paris, and Ottawa.

If it will make my suggestion appear as disinterested as it is, permit me to say that I am not an applicant for a position on this commission should it be appointed.

II. This bureau and its official personnel are the legal advisers to the Secretary of War, to all bureaus and officers of the department, and to the Army itself. Such is the relation established by law. The function of this bureau ought not to be, and safely can not be, ignored or minimized. There is no need or reason for ignoring or in any degree denying its functions or seeking to establish it extra legally elsewhere. And yet this is what is being done. Since this war began I have seen grow up in many of the bureaus of this department unofficial and extra legal law officers—lawyers who are commissioned, for instance, as reserve officers of the particular bureau, having no qualification for the work of that bureau and commissioned therein only to perform for it work which belongs to this bureau. It is an abuse of the appointing power so to use the Reserve Corps. If any bureau needs legal advice, the law requires that it be sought here; and this bureau can and will supply it reliably and expeditiously. The Judge Advocate General's Department has a reserve section to which the best legal talent of the country can gain admission. Such a system of supplying legal aid has given rise, as naturally it must, to uncoordinated legal direction and embarrassment, the extent of which is best known to this office, but the effect of which throughout the field of administration can not be lost. Congress has established one law bureau in this department. It certainly has not been found wanting; indeed, surely, it has proved helpful and has put every ounce of its effort behind correct departmental administration. There can be no reason, in fact, for attempting to disintegrate its functions. While I assume that such is not the desire of the department, such is inevitably the result of the present tendency of each bureau to furnish its own law officers. There is but one Judge Advocate General's Department; it is unlawful, unwise, and unsafe to attempt to create and rely upon others.

III. (*a*) The staff rank of the officers of this department has been placed on a grade below that of other staff officers. This has wrought a great injustice to the worthy officers of this department and is bound to have an injurious effect upon the legal administration of the Army. I know this discrimination has been made through the ignorance of line officers of the General Staff who can have no accurate comprehension of the importance of a judge advocate's work. The action, initially, was taken hastily and ill-advisedly. The merits of the proposition were not considered properly, if at all. No officer of this department was heard or consulted, yet this office has never been able to get a reconsideration of a matter which is vital to this department and must result detrimentally to the Army.

(*b*) This is in line with the recent ruling of the department to exclude all permanent staff officers from eligibility for appointment in the National Army. That rule is unlawful. The statute renders us eligible to command, and it is not within the lawful power of this department to render us ineligible. We can be rendered ineligible only by an arbitrariness that is unjustifiable in law, does an injustice to all whom it affects, has its entire basis in prejudice, and can result only detrimentally to the Army. Not only is it unlawful, it is even more unwise.

S. T. A.

MARCH 20, 1918.

Gen. CROWDER (personal):

1. I am now ready to start at any time on the proposed journey for the study of the Allies war laws and administration. I think my departure should be hastened.

2. More time will be required than I first reckoned. A rough estimate is: One week at Ottawa; 3 or four weeks at London; 3 or 4 weeks at Paris; 2 weeks in conference with our own authorities, military and civil. About 20 days will be consumed in ocean travel going and returning. I could leave for Ottawa almost immediately.

3. I have from time to time had conferences with members of the various foreign missions here, whereby I am satisfied I better know what is needed, and how to get it. Maj. Innes, of the British Embassy, has been the soul of courtesy, very interested, and very helpful. With great kindness he has offered to place his chambers at the Inns at my disposal.

4. My information is that the volume and the character of the work, together with the difficulty of getting the services of a stenographer abroad, will absolutely necessitate my taking along a stenographer from this office. The volume of dictation, copying, and note-taking will make the continuous services of a stenographer indispensable.

5. I am sure I do not exaggerate the benefits that will result from such a tour. There have been missions for everything else, but nothing has been done to acquaint us, especially, with the war laws and administration of the Allies. Indeed, it would be difficult to exaggerate the benefits. I am quite sure that the results of such a tour and study will be helpful to the Government, to the department, and to you, and that it will be especially beneficial and I hope creditable to you, to me, and to this office. I feel that this office, thus prepared, will thereby be enabled to exert greater influence in the department and outside of it.

ANSELL.

MARCH 30, 1918.

Memorandum for The Adjutant General.

Will you please issue travel orders immediately, in letter form, substantially as follows:

Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, accompanied by Mr. Earle L. Brown, civilian clerk, office of the Judge Advocate General, will proceed not later than April 1, 1918, to Ottawa, Canada, for the purpose of observing the Canadian forces under confidential instructions of the Secretary of War. Upon the completion of this duty both will return to their proper station. The travel, as directed, is necessary in the military service. Mr. Brown will be paid $4 per day in lieu of actual expenses, and the Quartermaster's Department will furnish him the necessary transportation.

S. T. ANSELL,
Brigadier General, National Army.

MARCH 30, 1918.

From: The Adjutant General of the Army.
To: Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, Washington, D. C.
Subject: Travel orders.

The Secretary of War directs as necessary in the military service that, accompanied by Mr. Earle L. Brown, civilian clerk, you will proceed not later than April 1, 1918, to Ottawa, Canada, for the purpose of observing the Canadian forces, under confidential instructions of the Secretary of War, and upon completion of this duty you and Mr. Brown, will return to your proper station.

Mr. Brown will be paid $4 per day in lieu of actual expenses, and the Quartermaster Department will furnish him the necessary transportation.

A. G. LOTT, *Adjutant General.*

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 16, 1918.

Confidential.
Memorandum for The Adjutant General (through the Judge Advocate General).
Subject: Travel orders for Brig. Gen. S. T. Ansell, National Army, Judge Advocate General's Department.

I request that orders issue directing that I proceed not later than the 20th instant to the port of embarkation at New York, and thence to France and such other of the allied countries in Europe as may be found to be necessary, for the purpose of observing the allied forces and studying their operations and studying and observing the principles and practice of the war laws and administration of the allied governments, in accordance with directions previously given the Judge Advocate General by the Secretary of War, and that upon completion of this duty I return to my proper station, reporting my observations in writing to the Judge Advocate General of the Army.

S. T. ANSELL,
Brigadier General, National Army.

[First Indorsement.]

To THE ADJUTANT GENERAL:

APRIL 16, 1918.

Recommending that orders issue in accordance with the above request.

E. H. CROWDER,
Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 17, 1918.

Confidential.

Memorandum for The Adjutant General.

The Secretary of War directs that an order in letter form be issued to Gen. S. T. Ansell, directing him to proceed not later than the 20th instant to the port of embarkation at New York and thence to France and such other of the allied countries in Europe as may be found necessary for the purpose of observing the principles and practice of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. Upon completion of this duty Gen. Ansell will be directed to return to his proper station.

Report of his observations will be made in writing to the Judge Advocate General of the Army.

WM. S. GRAVES,
Brigadier General, National Army,
Assistant to Acting Chief of Staff.

(F) GEN. ANSELL'S CHARGE THAT GEN. CROWDER OPPOSED GRANTING COUNSEL TO ACCUSED, AND GIVING ACCUSED LEGAL PROTECTION AT THE TRIAL.

Charge.—In Gen. Ansell's testimony before the Senate Committee on Military Affairs (p. 257), he charges that Gen. Crowder, in his testimony before the Committees of Congress on the Revision of 1916, stated:

> I must warn you to be careful about injecting into this system these civil principles that give you counsel, and protection at every stage of the proceeding, because it will disturb discipline.

Gen. Ansell further says that Gen. Crowder "said that (referring to above quotation) on pages 18, 20, 29, 30, 44, and 48 of the hearings, and repeated it time and time again."

Answer.—Gen. Ansell's statement is not in accord with the facts.

A careful examination of those hearings discloses that neither the statement quoted by Gen. Ansell, nor any statement of similar import, appears either on pages 18, 20, 29, 30 or 44 of the hearings. On page 48 of the hearings, Gen. Crowder, in discussing before the committee a proposition as to whether or not there should be a unanimous verdict by the court in a sentence imposing death, stated—

> To require a unanimous vote for the infliction of the death penalty in time of war would be going a long way, I think, toward impairing the success of the field operations of an army. If this were a proposition to regulate the trial of capital crimes in time of peace, the argument presented by Mr. Kahn would have greater force. As to a few military crimes, the death sentence is authorized in time of peace, but I have not been able to find any instance where a death sentence has been adjudged by a court-martial in time of peace. Over and above the court to act upon such a sentence is the convening authority, and over and above both the court and the convening authority stands the President of the United States, whose sanction is necessary in peace before a death sentence can be executed. I request that the committee consider very carefully the question of introducing into our military jurisprudence the principle of the civil law, which requires, in addition to these safeguards, a unanimous verdict.

Gen. Ansell's quotation is a plain misstatement of facts, and is an attempt to convey the impression that Gen. Crowder entertained opposition to surrounding an accused upon trial before general court-martial with any of the safeguards guaranteed by law to an accused in civil cases.

(G) APPELLATE PROCEDURE—GEN. ANSELL'S CHARGE THAT GEN. CROWDER ENTERTAINS AND HAS EXPRESSED ILLIBERAL VIEWS AS TO APPELLATE PROCEDURE.

Charge.—Gen. Ansell, before this committee, in discussing revision of the Military Code of 1916, charges Gen. Crowder with expressing illiberal views as to appellate procedure, to committees of Congress which considered and reported the revision of 1916. Gen. Ansell (p. 257) quotes Gen. Crowder as saying on this subject:

If there is one thing we must not have in the Military Establishment it is an appellate tribunal. (P. 257.)

Gen. Ansell further charges Gen. Crowder with the following statements:

In a military code there can be no provision for a court of appeal. Military justice and the purpose which it is expected to subserve will not permit of the vexatious delays incident to the establishment of an appellate procedure. However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be, in addition, the confirmation of the President. (P. 257.)

Answer.—A careful examination of the hearings before the committees of Congress which considered the revision of 1916 has been made. The following is the only comment by Gen. Crowder found in the hearings, on the subject of appellate jurisdiction:

I might interject here the remark that the administration of military justice differs from that of civil justice in that every case is appealed. There is always somebody above the trial court authorized to act by way of disapproval (p. 27, 1912 hearings).

Over and above the court to act upon * * * a sentence is the convening authority and over and above the court and the convening authority stands the President of the United States, whose sanction is necessary in peace before a death sentence can be executed. (P. 48 Id.)

A soldier is tried for an offense, the court convicts him, and the proceedings come to headquarters for approval. They are subjected to review by the commanding general. * * * The commanding general and his legal adviser think the proof not sufficient * * *. (P. 50 Id.)

(This statement was made in discussion of reviewing officers' power to approve as to a lesser included offense.)

The statement quoted by Gen. Ansell and the statements which he charges Gen. Crowder with making are not found in the hearings. The statements which Gen. Ansell charges that Gen. Crowder made on this subject are much broader than the actual language of Gen. Crowder, and would indicate opposition by Gen. Crowder to appellate procedure; which is not warranted by Gen. Crowder's testimony on the subject.

(H) GEN. ANSELL'S CHARGE THAT GEN. CHOWDER ENTERTAINS AND HAS EXPRESSED ILLIBERAL VIEWS AS TO ACCUSED'S RIGHT OF CHALLENGE.

Charge.—Gen. Ansell, on page 256 of the hearings, in charging Gen. Crowder with the expression of illiberal views before committees of Congress in hearings on the revision of 1916, quotes Gen. Crowder as follows, in respect of peremptory challenges:

I think it would be very harmful, indeed, for this committee to undertake to modify these Articles of War by injecting into them any of these civil protections.

Answer.—The hearings on this subject disclose Gen. Crowder's actual language to have been—

> It would be an innovation, and I think an unwise one. (P. 31, 1912 hearings.)
> The right of peremptory challenge which is common to our civil courts has never had a place in our military jurisprudence, * * * and I am inclined to think that its introduction would be fraught with grave consequences. (P. 32, Id.)

Gen. Ansell's exact quotation is not found in the hearings. It is not justified by what Gen. Crowder said on this subject. It conveys the impression that Gen. Crowder held opposition to permitting in trials by court-martial any of the safeguards accorded accused in civil courts. This is not justified by Gen. Crowder's language.

III.—Attacks upon the Present System of Administering Military Justice, and upon the Articles of War, and the Revision of 1916.

(A) Alleged archaism of the articles of war.

Charge.—Gen. Ansell charges in his testimony on the pending bill, S. 64, before this subcommittee, that our system is "a vicious anachronism" (pp. 102, 223, 229–230, 241), "medieval" (p. 230), "thoroughly archaic" (p. 102), "a witless adoption" of the British Articles of War of 1774 (p. 103).

He further says (speaking of the alleged archaism of the present military code):

> The Judge Advocate General in an address in the city of Chicago, reported in the press, which he has frequently referred to since, is shown as saying that all that the American Bar Association's president, Mr. Page, and Senator Chamberlain and other people who were going after this system, said, was true, except for the revision of 1916 of which he was the author. (P. 247.)

Answer.—He has reference to an address before the Chicago Bar Association January 13, 1919. I have never seen in print any allusion to the court-martial system made in the course of that address. The stenographic notes of what I said were, however, sent to me for correction, a correction, by the way, which I never made. From these notes I am able to speak positively, and they show that what I did say was this:

> Now, gentlemen, I have this to say, that I do not believe that there is a criminal code of any State of the Union that has embodied so much in the way of essential reforms, that reform organizations have been discussing, as the present Military Code of the United States, under which we have fought this World War.

I was here referring to the principal reforms in civil criminal jurisprudence that had been urged by criminologists in late years, together with the extent to which they had been already incorporated in the present military system, as follows:

1. *Brevity of pleading.*—This is a distinguishing feature of the military system. Sections 61 and 74 of the Court-Martial Manual require the pleading to "set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended."

2. *Presentment instead of indictment.*—This idea is inherent in the military system.

3. *Requiring the accused to testify.*—This idea prevailing under European codes of the civil law has been sometimes advanced as a

reform measure. It was not deemed desirable or compatible with American notions of justice and the code expressly prohibits it by the twenty-fourth article of war.

4. *Abolition of the presumption of innocence.*—This idea, also borrowed from the civil law, has been rejected in the military system. By section 277 of the Court-Martial Manual, the presumption of innocence is asserted as a presumption of law.

5. *Giving judge greater power in summing up.*—This is admitting the judge of the law to participation in the conclusion of fact. This is true of military trials.

6. *Abolition of unanimity of jurors.*—This is provided by the forty-third article of war, which requires a majority of the court for conviction except in death cases, when the concurrence of two-thirds is necessary.

7. *Curtailing the right of appeal.*—This proposition, frequently urged as a reform measure, has not been adopted in the military system where the tendency has been in the other direction.

8. *Curtailing press comment.*—This idea, adopted extensively in England and in some respects in a few States, lies beyond the military system altogether.

9. *Indeterminate sentences and probation.*—The military system has gone as far or farther than any civil jurisdiction in this direction.

10. *Safeguards of mental responsibility.*—Here, too, the military system has adopted advanced scientific theories and has provided by psychiatric examinations and otherwise against the conviction of the mentally irresponsible. Section 219 of the Court-Martial Manual provides for the interruption of trial and scientific examination wherever the existence of mental disease or derangement on the part of the accused is brought in issue.

My estimate of the present military system was not different from that made by the Senate Committee on Military Affairs on February 6, 1914, when they reported to the Senate upon a code substantially the same as the present, adopting the words of the subcommittee as follows:

> Convinced that the revision embodies many essential reforms in our military law, and that it presents an adequate and modern military code, your subcommittee earnestly recommends that the project, as set forth in the amended draft, be recommended for enactment.

(B) SAME SUBJECT.—ALLEGED "ARCHAISM" OF THE PRESENT ARTICLES OF WAR.

1. *Charge.*—Gen. Ansell says:

> In his statement to the Military Committee, the Judge Advocate General on May 14, 1912, said, "As our code existed it was substantially the same as the code of 1806."
>
> The modifications that were deemed necessary were simply such modifications as were necessary to make the articles fit into the mere machinery of our Government and introduce the requisite terminology. Speaking of his so-called revision of 1916, the Judge Advocate General said:
>
> "It is thus accurate to say that during the long interval between 1806 and 1912—106 years—our military code has undergone no change except that which has been accomplished by piecemeal amendment."
>
> The so-called revision of 1916 was only a verbal one and not an organic revision—the proponents themselves so stated. They did not contemplate the making of a single change.

Answer.—It will thus be seen that Gen. Ansell attempts to show out of my own mouth that there were no material changes incorporated into the revision of 1916, but that that revision was merely a rearrangement of the existing Articles of War.

He fails to call attention to the fact that between 1912 and 1916, the date of final enactment, many substantial changes had been secured and that these reforms acquired piecemeal between 1912 and 1916 were supplemented by other material reforms secured in 1916 and the whole then incorporated into the Articles of War and the Code enacted as a single piece of legislation in 1916.

Between 1912 and 1916 the following acts were passed, containing legislation looking toward the reform of the system of military justice:

The act of August 22, 1912 (37 Stat., 356).
The act of March 2, 1913 (37 Stat., 721).
The act of April 24, 1914 (38 Stat., 347).
The act of April 27, 1914 (38 Stat., 354).
The act of March 4, 1915 (38 Stat., 1084).

The act of August 22, 1912 (37 Stat., 356), secured the following reforms:

1. Exempted peace-time deserters from loss of citizenship rights; and
2. Permitted reenlistment of peace-time deserters by permission of the Secretary of War.

The act of March 2, 1913 (37 Stat., 721), secured the following reforms:

1. Enlargement of power to convene general courts-martial.
2. The creation of special courts-martial.
3. Enlargement of powers of summary courts.

The act of April 24, 1914 (38 Stat., 347) secured the following reform:

1. Volunteer forces were made subject to the laws, orders, and regulations governing the Regular Army.

The act of April 27, 1914 (38 Stat., 354), secured the following reforms:

1. Providing that an enlistment period shall not be regarded as complete until the soldier has made good any time lost from service by his own misconduct.
2. Authorizing the reviewing authority to suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement.

The act of March 4, 1915 (38 Stat., 1084), secured the following reforms:

1. United States Prison, Fort Leavenworth, Kans., changed to the United States Disciplinary Barracks.
2. Providing for the confinement in penitentiaries of military offenders convicted of civil felonies alone or of military offenses in connection with civil felonies.
3. Providing that all persons not convicted of civil felonies be confined in disciplinary barracks.
4. Providing for the organization of the disciplinary battalion, looking to the restoration or reenlistment of offenders in confinement in disciplinary barracks.
5. Authorizing the Secretary of War to remit the unexecuted portion of sentences of offenders sent to the United States Disciplinary Barracks for confinement; to order their honorable restoration to duty when not discharged the service, or when discharged from service to authorize their reenlistment upon their written application when their conduct in confinement so justifies.

6. Creation of branches of the United States Disciplinary Barracks.

No effort had been made to arrange in convenient form the amendments secured between 1912 and 1916. The revision of 1916, act of August 29, 1916 (39 Stat., 650), incorporated some of these changes into the Articles of War and in addition introduced many other changes, the more important of which are as follows:

1. Giving concurrent jurisdiction to general courts-martial, military commissions, and other war tribunals in certain cases.

2. Making mandatory that accused be furnished counsel at his request.

3. The inauguration of a system of suspended sentences of fine or confinement.

4. Providing for one or more assistant trial judge advocates for each general court-martial.

5. Authorizing the President to prescribe procedure before courts-martial.

6. Reenactment of the statutes of limitation for military offenses.

7. Granting to persons in the military force the right to remove to Federal courts all suits and prosecutions brought against them in State courts for acts done under the color of their military status.

8. Authorizing reviewing and convening authorities to mitigate a finding of guilty to a finding of guilty of any lesser included offense.

9. Reenactment of the statute concerning taking of depositions.

10. Making necessary the concurrence of two-thirds of the members of the court-martial in finding an accused guilty of an offense for which the death sentence is mandatory.

11. Guaranteeing the same treatment to officers and enlisted men in procedure prior to trial.

12. Establishing in commanding officers power to administer disciplinary punishment without the intervention of a court-martial.

13. Eliminating from the only remaining article of war (A. W. 56, false muster) in which a court-martial might adjudge in time of peace loss of civil rights, the power to deprive an accused upon conviction of such rights.

14. Creation of a comprehensive probate jurisdiction within the Military Establishment.

From the foregoing it will be seen that it is not true that the revision of 1916 was simply a codification and rearrangement of the Code of 1806.

2. *Charge.*—Gen. Ansell says, in substance:

> I say that his (Gen. Crowder's) revision (1916) did not revise and that we still have the British Code of 1774, itself of even more ancient origin—the so-called revision of 1916 was only a verbal one and not an organic revision—they (the revisers) did not contemplate the making of a single change—such revision as was made, made the structure even more firmly upon the principle that courts-martial are absolutely subject to the power of military command.

Answer. It is true that the revision of 1916 preserved the fundamental distinction between civil and military courts which the peculiar needs of each demand. What those peculiar needs are and the manner in which each must be met were discussed in my letter of March 10. I need not repeat them. But Gen. Ansell leaves the impression that theories for the administration of justice can become "modern and enlightened" only by discarding and destroying the fundamentals of systems that centuries of application have shown

to be both necessary and best. He is apparently not willing to admit that a real improvement and true modern enlightenment can be obtained by slow building upon old theories that are essentially sound. He commits himself to the proposition that improvement is possible only through revolution. To the wisdom of such a theory the American people have not yet been converted, although I must admit that current events are placing the issue before them in a very disagreeable way in many phases of their social and political life.

But, as I said in my letter of March 10, the Military Criminal Code of 1916 no more deserves the term "archaic" than the Revised Statutes of the United States, under which the Federal courts since 1878 administered civil justice, and it is nearly 40 years later than the civil Revised Statutes.

But Gen. Ansell would leave the impression that I am contending that the existing code is perfect and that it is capable of few, if any, improvements. This is an impression entirely opposed to what I said in my letter of March 10. I then said that, in the light of the experience of a great war "which subjected the military code to unprecedented test," I readily could admit that certain improvements, limited in number, have been demonstrated to be worth while introducing, and I did suggest in that letter the changes which I thought the experience of the war had disclosed to be necessary.

(C) COURT OF MILITARY APPEALS—GEN. ANSELL'S STATEMENT THAT GEN. SHERMAN AND GEN. JAMES B. FRY, FORMER PROVOST MARSHAL GENERAL, ADVOCATED SUCH A COURT.

Gen. Ansell in his testimony before this subcommittee said (p. 258) that Gen. Sherman said in an address to the graduating class at West Point June 12, 1882:

> I am quite willing to see a court of appeals on courts-martial established. It would settle a great many vexed questions and give a legitimate channel for subsequent operations, instead of those who make the laws being told the findings are all wrong by some fellow working up his own case on ex parte statements.

Gen. Ansell also (pp. 259–261) quotes from an article, "A Military Court of Appeals," found in Gen. Fry's book, entitled "Military Miscellanies," apparently advocating the establishment of such a court.

Answer.—(*a*) In quoting Gen. Fry's article, Gen. Ansell significantly—and, I think, disingenuously.—omits the one sentence in Gen. Fry's article which sums up the latter's whole attitude. That sentence, on page 186 of Gen. Fry's article, is:

> But it is the purpose of this paper merely to present the subject for consideration—not to advocate it.

(*b*) A close reading of Gen. Sherman's remarks to the 1882 graduating class at West Point shows that he was talking of some instrumentality for considering matters of clemency—like our present clemency board—rather than a technical court of appeals. Gen. Sherman's remark, quoted by Gen. Ansell, forms part of a very brief talk to the class—not much more than five minutes talk—following an address by Senator Harrison. Senator Harrison had been talking to the class on the subject of sobriety among Army officers and had spoken of "piteous appeals" of fathers and mothers for erring sons. Gen. Sherman's remarks followed somewhat along the

lines of Senator Harrison's address and advocated temperance. In the course of it he threw in the language quoted by Gen. Ansell. No such thing as a technical court of appeals was under discussion. This isolated remark is no proof of a settled conviction of Gen. Sherman on that question.

(D) CONDEMNATION OF THE NINETY-SIXTH ARTICLE OF WAR, THE SO-CALLED "GENERAL ARTICLE."

Charge.—Maj. Runcie says:

That was formerly known as "the devil's article." It was the catchall for everything that nobody had thought of putting specifically among the offenses triable by a court. It makes punishment possible, therefore, for any action which, though not involving any real offense, a commanding officer may choose to regard as prejudicial to good order and military discipline. If he can appoint a court that will accept his view of the matter or that he can coerce into agreeing with him, he can punish a man for almost anything.

This article serves another purpose also. It is available to defeat the ends of justice as well as to perpetrate injustice. If, for instance, an officer has been guilty of acts that would properly be described as "conduct unbecoming an officer and gentleman," the penalty for which is dismissal from the service—I mean that upon conviction under such a charge the sentence of dismissal is mandatory, the court having no discretion in the matter—and if for any reason the commanding officer does not desire to expose the accused officer to the risk of dismissal, he may cause the charge against him to be brought under this ninety-sixth article for "conduct to the prejudice" (p. 37).

Answer.—Here is severe condemnation of an article of war which has been in our code and the British Code for all time and about which the Supreme Court of the United States in an early case expressed a view not at all in harmony with that expressed by Maj. Runcie. Commenting on the corresponding article of the Navy code, that court said:

And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the thirty-second article of the Rules for the Government of the Navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the Navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are and how they are to be punished is well known by practical men in the Navy and Army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognized. (Dynes *v.* Hoover, 61 U. S., 65, 82.)

But a general article of this kind is not peculiar to military and naval articles alone. The criminal codes of many of the States and of the District of Columbia contain provisions similar to the ninety-sixth article of war for the punishment of offenses not specifically enumerated or described. The general article, therefore, seems to be in line with enlightened criminal codes. To illustrate, the Code of the District of Columbia contains the following in addition to provisions enumerating and defining specific offenses:

Punishment for offenses not covered by provisions of code.—Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than five years, or both. (District of Columbia Code, sec. 910.)

As another example, the Wisconsin Statutes contain the following:

Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this State shall be punished only by imprisonment in the county jail for not more than one year or by fine not exceeding $250. (Wisconsin Statutes, sec. 4635.)

In other words, these civil codes say that as to offenses not enumerated therein recourse may be had to the common law; and the military codes say as to offenses not enumerated you may have recourse to the common law, military; and the Supreme Court says as to this article of our military code that "it is not liable to abuse." It is a case of Maj. Runcie differing from the Supreme Court of the United States—that and nothing more.

I insert here a memorandum from Lieut. Col. Dinsmore, chief of the statistical section of the Judge Advocate General's Office, concerning the effect of the revision of 1916, upon charges laid under the "general article" (former sixty-second article of war; present ninety-sixth article).

SEPTEMBER 21, 1919.

Memorandum for Gen. Crowder.

Subject: Effect of the revision of 1916 upon charges laid under the general (old 62d) article of war.

1. During the fiscal year ending June 30, 1916, the total number of offenses of which men were convicted by courts-martial of all classes (general, special, and summary) was 58,957. Of these 33,767, or 57 per cent of the total number, were upon charges laid under the sixty-second article of war.

2. The revision of 1916 went into effect on March 1, 1917. It is therefore necessary to divide the fiscal year ending June 30, 1917, into two periods. Certain offenses were, during the first eight months of that year, charged under the sixty-second article, while, during the last one-third of the year, these same offenses were charged under various specific articles of the new code. As to these offenses I have assumed that two-thirds of the charges were laid under the old general article, and one-third under some specific article of the new code. Upon this assumption the following statement is made:

During the fiscal year ending June 30, 1917, the total number of offenses of which men were convicted by courts-martial of all classes (general, special, and summary) was 105,946, of which about 51,000, or 48 per cent, were upon charges laid under the sixty-second article of war.

3. The records of this office do not show the specific articles of war under which offenses have been charged subsequent to June 30, 1917, nor the offenses of which men have been convicted by special and summary courts-martial. I think it may be assumed that the instruction contained in paragraph 74 (e) Manual for Courts-Martial, viz: That a charge shall be laid under a specific article, whenever possible, has been generally followed. Upon this assumption the following facts are stated:

During the fiscal year ending June 30, 1918, the total number of offenses of which men were convicted by general courts-martial was 17,202. Of these, 13,085 were convictions of offenses which could have been charged under a specific article of war, and 4,117, or about 24 per cent of the total number were upon charges which could properly have been laid under the general (96th) article.

During the fiscal year ending June 30, 1919, the total number of offenses of which men were convicted by general courts-martial was 20,933. Of these, about 15,333 were upon charges which could have been laid under a specific article, while about 5,600, or about 26 per cent of the total number were upon charges which could properly have been laid under the general (96th) article.

JOHN P. DINSMORE,
Lieutenant Colonel, Judge Advocate.

(E) GENERAL ORDERS, NO. 7, WAR DEPARTMENT, JANUARY 17, 1918, AS AFFECTING RECOMMENDATIONS OF CLEMENCY BY THE JUDGE ADVOCATE GENERAL.

Charge.—That General Orders No. 7 prevented or hindered recommendations of clemency by the Judge Advocate General.

Gen. Ansell says:

But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of military justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this

order acted as a limitation to that effect, upon these reviews and studies we made since the time of the publication of General Orders, No. 7, until after I got back * * * (p. 182).

When I got back I took the bull by the horns, because it was nothing less than that, and I reversed what the Acting Judge Advocate General had in my absence very properly, as a matter of law, held to be the limitations placed upon our office to recommend clemency, and instructed the boards to review and recommend clemency in proper cases.

Senator CHAMBERLAIN. To recommend to the President?

Mr. ANSELL. To the President, or to a subordinate commander. I wish to say here that when we began to recommend this clemency to these commanding generals below, it had to be done with a delicacy that does not speak well for justice. They are men of power, supported by the War Department, and they wanted no interference from a mere lawyer, and frequently we got very sharp retorts from them to the effect, "You had better mind your own business; we know what this requires."

Senator CHAMBERLAIN. They were superior in rank to the men who made the recommendations.

Mr. ANSELL. Yes. They are major generals, and at best the head of my office was only a brigadier (p. 182).

Answer.—General Orders No. 7 never hindered recommendations of clemency. The fact is that the practice of the Judge Advocate General's Office in recommending clemency was never interrupted. Recommendations for clemency in appropriate cases have always been made. Nothing was contained in General Orders No. 7 preventing or restricting that practice, nor have I ever heard until now that such an interpretation of the order was ever suggested by anyone. No such view of it was taken by Gen. Ansell. He did not raise that objection in his memorandum in opposition to General Orders, No. 7, nor did he, while acting himself on these cases, entertain such a view. As late as April 17, 1918, two months and a half after General Orders, No. 7, had been in force and just before his departure for France, I find Gen. Ansell himself returning a record to a division commander with advice that the sentence was legal, coupled with a recommendation that it be mitigated. (Case 112666, Clifton Cox, Apr. 17, 1918.) During Gen. Ansell's absence in France, the Acting Judge Advocate General was Col. James J. Mayes, who certainly recommended clemency in one case within General Orders No. 7. (Case 115198, James Cox, June 19, 1918.) Whatever instructions Gen. Ansell gave upon his return, to recommend clemency in proper cases, inaugurated no new practice in this respect. To recommend clemency it was never necessary to do violence to General Orders No. 7.

To the same effect is the testimony of Col. Clark and Col. Davis given before the Senate Military Affairs Committee in February of 1919. Col. Clark said:

Now, I may say that under General Orders No. 7, which was put in operation in January, 1918, the record came direct to the Judge Advocate General, and we built up a practice during the months of January, February, March, April, and May, while I was in that section, of not only calling attention to jurisdictional and legal defects, but also accompanying the record with a recommendation as to the place of confinement, and the quantity of punishment that should be imposed, with a view of securing some uniformity of policy in respect to the amount of punishment imposed for certain classes of offenses. I do not know what became of that practice after I left the section, but understand that there was a change (pp. 186, 187).

Col. Davis said:

I may say to you, sir, that in practically all of those cases the sentence has been scaled down on the recommendation of the Judge Advocate General to what that office thought should be the case.

Since General Orders No. 7 went into effect, there is not a man in the whole service sentenced to be dishonorably discharged and to a long term of confinement whose case has not been passed upon by the Judge Advocate General's Office, by the board of review since that has been constituted, and his case passed upon for the very purpose of determining the amount of punishment which that man should serve. He is in the disciplinary barracks at this time serving, not the punishment which the court awarded him, but the punishment which the Judge Advocate General's Office, after reviewing the case, thinks he ought to bear (p. 221).

And again, Col. Davis said, outlining the progress of a case:

Now, General Orders No. 7 requires them to suspend the execution of a sentence until it is reviewed in the office of the Judge Advocate General. The Judge Advocate General reviews that sentence and advises the commanding officer out there at Camp Meade as to the result of his review. * * *

The sentence of dishonorable discharge would be suspended by the reviewing authority and the man would be sent under that suspended sentence to the disciplinary barracks. The disciplinary barracks for Camp Meade would be Fort Jay, N. Y. He is sentenced to 10 years, and after review the Judge Advocate General's Office recommends that 9 years of the sentence of confinement be remitted. Then the man stands under a sentence of dishonorable discharge which has been suspended until he is released. In other words, Senators, the unexecuted portion of that sentence may be remitted and the man restored to duty without being dishonorably discharged, and he can be put right back in the Army (pp. 222, 223).

Col. Davis further said:

Yes, sir. I might say, that Gen. Ansell, in his letter to Congressman Burnett, says that in 1918, September, 1918, he directed his board of review to suggest to reviewing authorities the very corrective action which had been applied between November, 1917, and April, 1918. It was at that time opposed by him on the ground that it was not correct procedure according to his theory of what the law authorized (p. 225).

Col. Davis, in his testimony, was dealing with the period prior to his own relief from duty in the Military Justice Division of the office, which occurred about the middle of May, 1918 (p. 200).

The Inspector General says in his report of May 8, 1919, upon "Investigation of the controversies pertaining to the office of the Judge Advocate General:"

The provisions of General Orders No. 7 became effective on February 1, 1918. From that date until April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action be taken where illegality appeared in the proceedings, but brought to their attention, with a view to mitigation, sentences which were unduly severe. During this period all cases arising under General Orders No. 7, before final action thereon, were handled either independently by Col. Davis, Chief of the Military Justice Division, or by General Crowder upon recommendation from Col. Davis. This was partly because Col. Davis had drafted the orders, and was in sympathy with them, and also because Gen. Ansell, after publication of the orders, was plainly antagonistic.

IV. Gen. Ansell's Inaccurate Statements.

(A) REVIEW OF RECORDS OF TRIAL IN JUDGE ADVOCATE GENERAL'S OFFICE.

Charge.—Gen. Ansell said to this subcommittee, on the hearing on S. 64:

Why, Senator, we did not review. * * *. We revised officers' cases, we revised death cases, and we got little further. There was one man, not always the best man, and with all too much to do, who revised—that is looked over—the other cases (p. 134).

I say that the cases were not properly reviewed. I say that they were not all reviewed; that there were only a few of them that were reviewed, * * * (p. 159).

Answer.—The truth is to the contrary.

The truth is (1) that penitentiary sentences were reviewed during the war and still are, in precisely the same way and with the same

care as officers' cases and death sentences; and (2) that all other sentences were and are carefully examined by at least two officers—minor sentences not carrying dishonorable discharge in the "Retained in Service Section," and disciplinary barracks sentences in the "Disciplinary Barracks Section" of the office—First, by an officer to whom the case is assigned; and, second, by the chief of the section; and in many of those cases written reviews are prepared and examined by other officers in addition. Nor is it true that the officers serving in these sections were not among the best men in the office; for example, Maj. E. H. Lewis, former assistant attorney general of the State of New York, was for a long time chief of the retained in service section, followed by Maj. Walter M. Krimbill, former assistant United States district attorney at Chicago. Maj. (now Lieut. Col.) J. A. Tyson, an eminent lawyer of Mississippi, at present acting as counsel to the Board of War Purchase Supplies, was chief of the Disciplinary Barracks Section; succeeded by Maj. Charles Harris, now president pro tempore of the Senate of the State of Kentucky, and then by Maj. W. Calvin Wells, another well-known Mississippi lawyer, formerly secretary of the campaign committee of Senator Harrison.

In the penitentiary section also were many of the most capable men in the office, including at various times such men as Maj. S. S. Bennet, formerly president of the State Bar Association of Georgia, Maj. G. P. Middleton, a leading trial lawyer of Philadelphia, Maj. Pratt Adams, another eminent Georgia lawyer, Maj. Junius Adams, now counsel for the American Liquidation Commission in Europe, and others of similar ability and standing. Among the chiefs of that section were Maj. Henry W. Runyon, a very capable New Jersey lawyer; followed by Maj. E. F. Noble of Pittsburgh, now secretary of the American Liquidation Commission in Europe; and then by Maj. Robert Bright, one of the most prominent lawyers of Philadelphia. Written reviews were required from this section of all penitentiary cases, which afterwards went through the hands of the board of review and of Col. B. A. Read, the chief of the Military Justice Division of the office, before reaching the head of the office for signature—in just the same way as the death and dismissal cases. Prior to November 6, 1918, penitentiary cases went through the same board of review as the death and dismissal cases. After the institution of the "second board of review" on November 6, 1918, penitentiary cases went to that board, which was composed of three of the very ablest and most experienced lawyers connected with the Judge Advocate General's Department; namely, Lieut. Col. J. Sydney Sanner, who resigned his position on the bench of the Supreme Court of the State of Montana to enter this department; Lieut. Col. S. Moreland, for nine years a judge of the Supreme Court of the Philippine Islands; and Lieut. Col. W. H. Kirkpatrick, a leading Pennsylvania lawyer with a wide trial experience.

(B) FORFEITURE OF CITIZENSHIP.

Charge.—Gen. Ansell says:

> There are certain offenses—desertion, for instance—which carry with them incidental punishments in the way of civil disabilities. A man convicted of desertion is outlawed. He loses his right to citizenship and his right to hold office, etc. (p. 205).

Answer.—The truth is to the contrary.

No citizen loses his citizenship except by voluntary expatriation. What Gen. Ansell refers to is his citizenship rights and his right to hold public office. The loss of these rights as a penalty is now confined to the single offense of desertion committed in time of war. The forfeiture is not provided by the Articles of War but by special acts of Congress. (Rev. Stat., secs. 1996–1998.) The original act of March 3, 1865, provided that all persons who should desert the military or naval service in time of peace as well as in time of war or should leave the United States to avoid a draft, forfeited their rights of citizenship or to become citizens and should be forever incapable of holding any office of trust or profit under the United States or of exercising any right of citizens thereof. I was particularly active in helping to bring about a modification of this civil war statute, which was effected by the passage of the act of August 22, 1912, amending section 1998, Revised Statutes, so as to remove the penalty from desertion in time of peace.

Up to 1916 there was one other military offense punishable with the disability to hold office, namely, making or signing a false muster. The present Articles of War omit the disqualification as part of the penalty for this offense. This was done in pursuance of my recommendation to Congress as follows:

> The further phrase "and shall thereby be disabled to hold any office or employment in the service of the United States," occurring in existing Articles of War 6 and 14 has been omitted * * * for the reason that punishment by way of disqualification to hold public office, both civil and military, is believed to be a particularly inappropriate one to be awarded by a military tribunal; and there is this further reason * * * that the offenses specified, though grave, are not more so than sundry other military crimes for which less severe penalties are provided. It is the effect of this revision to abolish this form of punishment—disqualification to hold office—in all cases where it is authorized in the existing code (Comparative Print, Articles of War, Gen. Crowder's note to Article 56.)

(C) CAMP GRANT RAPE CASES.

Charge.—Gen. Ansell said before this subcommittee (hearings on S. 64, p. 262):

> That as a result of the first trials in May and June, 1918, 17 men were convicted.

He said further (p. 263):

> All of them were convicted and they would have been hanged by this time.

Answer.—The truth is to the contrary.

(1) On the first trials in May and June, 1918, only 15 of the accused were convicted, 6 of whom were sentenced to hang and the remaining 9 were sentenced to life imprisonment; 1 accused was acquitted as insane, and 5 others were acquitted.

(2) Even if the sentences imposed by the first courts in 1918 had been executed, only 6 of the 15 convicted could have been hanged.

(D) PROPORTION OF CHARGES PREFERRED, REFERRED FOR TRIAL; CONVICTIONS; ACQUITTALS.

Charge.—In his testimony recently given before this subcommittee Gen. Ansell says:

> Out of every 100 sets of charges drafted by an officer against an enlisted man, between 96 and 97 were tried (p. 199).

Answer.—The truth is these statistics relate to charges approved by the commanding officer and forwarded with his recommendation of trial; not to all charges "drafted" by any officer.

Of course, Gen. Ansell means to be understood as saying: Out of every 100 sets of charges "forwarded" and not "drafted." Many charges that are drafted and presented to a commanding officer to be forwarded for trial are dropped on the preliminary examination; or referred for trial to an inferior court. As to the number of these, no statistics are available. Amending, therefore, the statement to read "forwarded" and not "drafted," Gen. Ansell's figures are substantially correct. Examinations of the statistics for 1912, 1913, 1914, and 1915 have been made, and of the total number of sets of charges forwarded to convening authorities 96.36 per cent were ordered by those convening authorities to be tried.

SAME SUBJECT.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

Between 96 and 98 of every 100 charges preferred result in trial and conviction (p. 266).

Answer.—The truth is, again, the statistics relate not to all charges preferred, but only to those approved for trial, both by the commanding officer and by the convening authority. Even so, the truth is to the contrary.

Gen. Ansell undoubtedly means to say "referred" by the convening authority for trial; and not "preferred." The statistics for a single year—that of 1918—have been considered, and of those referred for trial there were acquittals in 12.01 per cent; and, of the convictions by the court, reviewing authorities disapproved an additional 5.05 per cent; so that the total resulting in acquittals, or disapproval, which is the equivalent of acquittal, was 17.06 per cent. So that the statement of Gen. Ansell that between 96 and 98 per cent of the charges preferred resulted in trial and conviction, and between 2 and 4 per cent of such charges resulted in acquittals, is erroneous.

Of course, these statistics take no account of special and summary court charges drafted, preferred, or referred for trial.

(E) STATISTICS OF COURT-MARTIAL TRIALS FOR THE YEAR PRECEDING THE ARMISTICE.

Charge.—Gen. Ansell says, in his testimony before this subcommittee:

For the year immediately preceding the armistice, according to the reports that I have, there were 28,000 general courts-martial out of an army of an average of 2,000,000. We know the size of the army the year before the armistice, and we know the size of the army at the time of the armistice, and I roughly estimate it at 2,000,000 men average.

In the inferior courts during the same period there were between 340,000 and 360,000 cases (pp. 190, 191).

I do not know how the inferior court cases were divided between special courts and summary courts; we have no way of telling that, as those records do not come to us except in unusual cases (p. 191).

Answer.—The truth is to the contrary.

(*a*) The number of men tried by general courts-martial from November 11, 1917, to November 11, 1918, by months, is as follows:

1917.

November (two-thirds of whole number of cases for that month)	482
December	910

1918.

January	1,150
February	1,302
March	1,577
April	1,449
May	1,267
June	1,350
July	1,457
August	1,515
September	1,171
October	1,103
November (one-third of whole number of cases for that month)	449
Total	15,182

(*b*) During the fiscal year ending on June 30, 1918, the total number of trials by summary courts-martial in all commands was 229,839, 202,085 of which resulted in convictions and 9,732 in acquittals (some commands did not report the number of convictions and acquittals). During the same period the total number of trials by special courts-martial was 14,715, of which 13,275 resulted in convictions and 1,440 in acquittals.

Incomplete reports for the fiscal year ending June 30, 1919, show a total number of 200,614 trials by summary courts-martial, of which 189,270 resulted in convictions and 11,344 in acquittals; and 23,634 trials by special courts-martial, of which 20,565 resulted in convictions and 3,069 in acquittals.

(*c*) Taking two-thirds of the total number of trials by special and summary courts-martial during the fiscal year ending June 30, 1918, and one-third of the total number of trials by those courts during the fiscal year ending June 30, 1919, it may be stated that there were, between November 11, 1917, and November 11, 1918, a total of about 218,752 trials by summary courts-martial and about 17,971 trials by special courts-martial, or a total of 236,723 trials by inferior courts.

In order to supply the figures upon trials by inferior courts during the fiscal year ending June 30, 1919, concerning which reports have not yet reached this office, I estimate (liberally) that a total of 35,000 cases ought to be added to the number quoted, to be divided as follows: Summary court trials, 90 per cent; special court trials, 10 per cent.

Adding these figures to those already quoted it may be stated that the total number of trials by summary and special courts-martial from November 11, 1917, to November 11, 1918, was about 271,723; as against 340,000 to 360,000, as stated by Gen. Ansell.

(*d*) The Judge Advocate General's published report for 1918 (p. 15) shows a segregation between special and summary court statistics.

(*e*) Summarizing, therefore, we have, for the year immediately preceding the armistice, about 15,182 trials by general courts-martial, as against 28,000, as stated by Gen. Ansell; and about 272,000 trials by inferior courts, as against 340,000 to 360,000, as stated by Gen. Ansell. We also find that the Judge Advocate General's published report for 1918 (p. 15) shows a segregation between special and summary court statistics.

(F) CLEMENCY BOARD.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

The Judge Advocate General organized this special board of clemency review, consisting of three lawyers chosen, as I say, especially because they reflected absolutely the views of the department and the Judge Advocate General. Seldom or never could that board find a case poorly tried. They were all well tried. So that every case that the clemency examiner reported as poorly tried went to this clemency board, when they would report back to the Judge Advocate General, frequently in language characterized by brusqueness and unjudicial temper. They would say, "It is absurd to say that this case was poorly tried" (p. 196).

Gen. Ansell also states:

More than 60 per cent of these cases were so badly tried that no man—no fair-minded and intelligent man—could say that the records can be relied upon to sustain any punishment (p. 119).

Answer.—According to a report prepared by Lieut. Col. J. Sydney Sanner (former justice of the Supreme Court of Montana), chairman of the special board of review referred to by Gen. Ansell, under date of June 15, 1919, the special clemency board had, on that date, considered 4,268 cases, of which 1,010 had been passed on by the special board of review. If it is true, as stated by Gen. Ansell, that "every case that the clemency examiner reported as poorly tried went to the clemency board," then Gen. Ansell's statement that "more than 60 per cent of those cases were so badly tried that * * * no fair-minded and intelligent man could say the records can be relied on to sustain any punishment," is inaccurate, since on June 15, 1919, out of 4,268 cases considered by the special clemency board, only 1,010, or about 25 per cent, had been reported by the clemency examiner as "poorly tried."

Of the 1,010 cases referred to the special board of review, that board found that 342 were fairly characterized as "poorly tried," "bad," "doubtful," or "unsatisfactory"; and that of those 342 "poorly tried" cases the characterization was justified in 206 by the admission of improper evidence; in 136 by the inertness or inadequacy of counsel for the accused; in 69 by poor preparation on the part of the prosecution; in 42 by errors of the court in rulings at the trial; and in 32 by the fact that no evidence was presented aliunde the plea of guilty.

[In other words, in approximately 143 of these cases, the characterization was justified on more than one of these grounds.]

The report also shows that, of the 4,268 cases considered by the special clemency board, a trifle under 1 per cent were bad; a trifle under 2 per cent were bad, doubtful, or unsatisfactory; a trifle under 5 per cent show formal irregularities; a trifle over 8 per cent were poorly tried.

(G) SAME SUBJECT—CLEMENCY BOARD.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

Some time in early March I observed that the clemency examiners, the officers who made the records, evidently did not understand the considerations that would have governed me in examining the records for purposes of clemency. They were deferring too much to the record. They were approaching it as they would review a record for determining errors of law, and were not taking into account what the record reflected of the human situation; not governed by those aspects, but simply by the legal determinations of the record * * * (p. 192).

Senator LENROOT. Do I understand by that, General, that the policy was that if they found what would have been in a civil court a reversible error they would recommend clemency, but otherwise not? (p. 192).

Mr. ANSELL. It was largely that; and they were pretty strict about the reversible-error proposition also. Yes, Senator; that probably expresses it as accurately as it could be expressed (p. 192).

Answer.—The truth is to the contrary.

The report of the special board of review referred to in the last preceding paragraph shows that of the first 4,268 cases considered by the special clemency board the question of the legal sufficiency of the record was raised by the clemency examiner in only 1,010 cases, or about 25 per cent of the entire number.

From February 25, 1919, to September 29, 1919, inclusive, 6,824 cases had been considered by clemency agencies in the office of the Judge Advocate General. Prior to the time at which these cases were considered by the special clemency board, the record of trial in each of the cases considered by that board had been examined as to its legal sufficiency by at least one officer in the office of the Judge Advocate General, and many of these records had been examined by more than one officer. Of the 6,824 cases examined by the special clemency board during the period stated, clemency in some form was recommended in 5,584 cases, or about 82 per cent of the entire number, and as a result of this examination a reduction in the average sentence has been brought about equal to about 73 per cent of the average sentence adjudged in the cases considered. This shows, not that the records of trial in these cases were legally insufficient or the sentences were generally considered to have been too severe when imposed, but merely that the return of conditions approximating those of peace has made possible an amelioration of the rigors of punishment required in time of war.

I append a statistical report by Lieut. Col. N. D. Ely, of the Judge Advocate General's office:

I.

Statistics based on clemency memoranda.

1. Total number of cases finally passed upon during the period, Feb. 25 to Oct. 15, inclusive	7,207
2. Less total number of life sentence cases	112
3. Balance, considered under subdivision II	7,095

II (exclusive of life sentences).

1. Number of unexecuted sentences to confinement wholly remitted	2,075
2. Number of unexecuted sentences to confinement partially remitted, or other clemency granted	3,740
3. Number of cases in which no clemency was extended	1,280
4. Average sentence to confinement before remissions.....years..	6.63
5. Average sentence to confinement remaining after remissions.....do....	1.845
6. Per cent of reduction	72.06

III (included in subdivision II).

1. Number of men recommended for or authorized to apply for discharge in accordance with A. R. 139 and in the form provided in section 3, A. R. 150.	584
2. Number of men recommended for restoration to duty or authorized to apply for restoration	489
3. Total number of cases in which, as shown by item No. 38 (mental ailments) on clemency memoranda, the mental condition of the prisoner was especially considered	1,600

IV.

1. Number of life-sentence cases in which clemency was denied..... 90
2. Number of life-sentence cases in which clemency was extended..... 22
3. The 22 life sentences in which clemency was granted were reduced as follows: One to 40 years; six to 20 years; five to 15 years; one to 10 years; one to 8 years; one to 7 years; three to 5 years; one to 4 years; one to 3 years; two to 2 years.

1. Total number of cases in which no clemency was extended..... 1,370
2. Per cent of total cases in which no clemency was extended..... 19.00
3. Per cent of total cases in which the mental condition of the prisoner was considered..... 22.2

(H) SAME SUBJECT. ORGANIZATION OF THE CLEMENCY BOARD.

Charge.—Speaking of the organization of the clemency boards, Gen. Ansell makes the following statements:

Gen. Crowder takes credit that the existing clemency board, upon which I am still held as president, was established by him upon his return to this office, as though he discovered the situation necessitating it (p. 222).

"I must be permitted to say this: Every organ of that office (the J. A. G. O.) designed to secure * * * moderation of sentences—which now he (the Judge Advocate General) calls so effectively to his aid—was instituted by me and by me alone. Without any authority from or help of the Judge Advocate General I organized * * * the clemency board—and it was my effort, taken in his absence, that showed the necessity for the special clemency board, which, though restricted in every covert way by the department and the office of the Judge Advocate General, has done so much recently to reduce sentences. The Judge Advocate General's attitude has been one of absolute reaction. He has not approved of such organization; he has not approved of my efforts to secure correctness of court-martial judgments or moderation of them (p. 244).

Answer.—This statement of Gen. Ansell's is widely variant from the facts. They are all summarized in the attached memorandum; and, in an appendix to the memorandum, is set forth the entire correspondence on the subject. Let the facts speak for themselves.

I insert here a chronological statement concerning the organization of the special clemency board in the office of the Judge Advocate General, together with copies of original documents relating thereto.

MEMORANDUM CONCERNING THE CREATION OF THE SPECIAL CLEMENCY BOARD IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

Exhibit 1, January 11, 1919: Memorandum from Acting Judge Advocate General Ansell to the Secretary of War.

Exhibit 2, January 13, 1919: Letter from the Secretary of War to Gen. Crowder, transmitting foregoing memorandum.

Exhibit 3, January 18, 1919: Memorandum from Gen. Crowder to the Secretary of War, replying to foregoing and transmitting Exhibit 4.

Exhibit 4, January 17, 1919: Form of order limiting punishments for offenses committed since the armistice (published by The Adjutant General's telegram of Jan. 22, 1919).

Exhibit 5, January 20, 1919: Memorandum from the Secretary of War to Gen. Crowder, approving recommendations in Exhibit 3.

Exhibit 6, January 28, 1919: Office order No. 18, J. A. G. O., signed by Gen. Crowder, organizing and appointing clemency board.

Exhibit 7: Plan for carrying out work of clemency board, suggested by board and approved by Gen. Crowder.

Exhibit 8, March 5, 1919: Memorandum assigning officers to three divisions of clemency board and announcing rules of procedure.

1. Prior to the creation of the clemency board on January 28, 1919, there had existed, as an integral part of the military justice division of the office of the Judge Advocate General, the clemency and restoration section. A description of the func-

tions of the clemency section and a detailed statement of the attitude toward cases arising during the war are foreign to the subject of this memorandum, but it may properly be stated that the clemency section had not followed the policy of recommending reduction of sentences to confinement. In those cases where under all the circumstances the prisoner was deemed to have served a sufficient portion of the sentence, his release was recommended; while in other cases, clemency was not recommended, or was not recommended "at this time."

2. On January 11, 1919, Acting Judge Advocate General Ansell wrote a memorandum to the Secretary of War (Exhibit 1), commenting on eight particular cases and severely criticizing the procedure of courts-martial and reviewing authorities. He said, among other things: "I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. * * * From every point of view they are a travesty upon justice."

He stated that in a great number of cases he had invited the attention of convening authorities to the great severity of the punishment; and concerning the eight cases commented on by him, he stated that he would call the attention of the reviewing authority to the severity of the sentences and in some of them suggest remissions or further reductions.

He concluded by saying: "Again I have to advise you that these are not, in my judgment, isolated examples, but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believe I have observed, during this war."

He made no recommendation, nor did he suggest any remedy for the conditions he characterized. (See Exhibit 1.)

3. On January 13, 1919, the Secretary of War forwarded the foregoing memorandum in a letter to Gen. Crowder (Exhibit 2), in which he said:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose (1) very unequal degrees of punishment, and (2) perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

"I am not able to gather from Gen. Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view."

4. Responding under date of January 18, 1919 (Exhibit 3), Gen. Crowder briefly discussed the matter under the two heads:

(*a*) Unequal punishments of courts-martial.

(*b*) System of war-time penalties no longer necessary.

After stating that the only issue is in respect of the quantum of punishment, he recommended that to meet the situation in future a general order be issued (see Draft Exhibit 4).

"To meet the past situation, I propose that this office, after classifying the sentences imposed, shall proceed under approved rules to equalize punishment through recommendations of clemency."

5. In his memorandum of January 20, 1919 (Exhibit 5), the Secretary approved both recommendations, and concerning the clemency recommendation said: "I * * * will be glad to have you undertake it."

6. January 22, 1919, The Adjutant General issued by telegram the following order (being identical with Exhibit 4):

"In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges or a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing shall be made a matter of record. Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

7. Thereafter the clemency board was promptly organized. See order of Gen. Crowder of January 28, 1919 (Exhibit 6), and also (Exhibits 7 and 8).

8. The clemency board has considered cases upon the court-martial records and the data furnished from the disciplinary barracks and the penitentiaries without waiting for applications for clemency; the clemency section (first above mentioned) has considered cases upon applications for clemency, applying generally the same rules and standards for uniformity as the clemency board.

EXHIBIT 1.

JANUARY 11, 1919.

Memorandum for the Secretary of War.

1. I have just finished reviewing the general court-martial cases from Camp Dix, under General Order 7, which have been presented to me to-day by the Chief of the Military Justice Division of this office. Those cases relate of course to that command alone, but I fear and have reason to believe that they evidence a situation that is much more general. This condition is directly due to a failure upon the part of the court-martial—a failure which in this case appears to be absolute—to appreciate the high character of their judicial functions and a similar failure upon the part of the convening and reviewing authority. Under the limitations of law, regulations and orders, as construed in the War Department, this office was limited to advising the reviewing authority as to whether the record of trial was "legally sufficient to sustain the findings and sentence of the court," and was not otherwise concerned with the quantum of punishment; this upon the view, of course, that the jurisdiction of the convening authority is final and beyond review. Nevertheless, impelled by the irresistible evidence found in the great number of unjust sentences passing through this office, I have presumed, with a hesitation which the delicacy of the situation demands, to invite the attention of convening authorities to the great severity of the punishment in those cases in which the punishment has appeared to be so disproportionate to the offense as to shock the conscience. In the light of what is transpiring at Dix, and doubtless elsewhere, I do not regard that such an administrative course, taken in specific instances, is sufficient to achieve and establish military justice.

2. The cases to which I now invite your attention have all come to me to-day as a part of the day's work. The officers who have handled them in this office and I are of one mind as to what they reveal and as to the necessity for the application of curative measures. I will give you a brief summary of them.

(*a*) In the case of Pvt. Sanford B. Every, Forty-ninth Company, Thirteenth Battalion One hundred and fifty-third Depot Brigade, the accused was convicted simply of having a pass in his possession unlawfully. He was sentenced to be dishonorably discharged with total forfeitures and to be confined at hard labor for 10 years. The reviewing authority reduced the confinement to three. We consider this a trivial offense, and this office will doubtless go so far as to suggest to the convening authority that, inasmuch as this soldier has already been in confinement about two months, the entire sentence should be remitted.

(*b*) In the case of Pvt. Clayton H. Cooley, Thirteenth Company, Fourth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of absence without leave from July 29 to August 26, 1918, and from September 1 to September 8, 1918; failing to report for duty; escaping from confinement September 1, 1918. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor for 40 years. The reviewing authority reduced the confinement to 10 years. The man has evidently been in confinement since last July. Even as so reduced, the sentence is altogether too severe, and this office, in returning the record to the convening authority, will so comment upon it.

(*c*) In the case of Pvt. Charles Cino, Seventy-first Company, One hundred fifty-third Depot Brigade, the accused was tried for disobeying an order "to take his rifle and go out to drill," on November 1, 1918, and on escaping from confinement on November 4. He was sentenced to be dishonorably discharged the service and confined at hard labor for 30 years, which period of confinement the reviewing authority reduced to 20. In this case, the accused claimed that he was sick, and doubtless he was suffering somewhat from venereal trouble. It may be that he was a maligner. In our judgment, the sentence, even as reduced, was entirely too severe, and this office will so comment upon it to the convening authority.

(*d*) In the case of Pvt. Calvin N. Harper, Company A, Four hundred and thirteenth Reserve Labor Battalion, the accused was charged with desertion and convicted of absence without leave from the 12th day of August to the 13th day of November, 1918. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for 20 years, which period of confinement the

reviewing authority reduced to 10. The period of confinement even as reduced is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company 36, Ninth Training Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife with a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, Fifty-eighth Company, Fifteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of disobeying the order of his lieutenant to "give me those cigarettes;" behaving in an insubordinate manner to one of his sergeants by telling him to "go to hell," and behaving himself with disrespect towards his lieutenant by saying to him that he, the accused, did not "give a God damn for anybody." Of course there can be no question but that such conduct can not be tolerated, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was a company rumpus, which, in my judgment, might have been otherwise dealt with or under the circumstances of its commission, merited no very long term of confinement. There was no evidence of previous misconduct. The court sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, Forty-ninth Company, Fourteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, Base Hospital, tried at Camp Grant for insubordinate conduct, which, at worst, could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages in his review to show that such punishment was well merited.

3. If these were isolated examples, they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

4. If the courts are blameworthy, the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this, found in a camp order which provides as follows:

"Absence-without-leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court."

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction the court must realize that it has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this—and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543) and Grafton *v.* United States (206 U. S., 333). There are numerous other

decisions to this effect. (The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.)

This order contains, in effect, and was intended to convey the following directions:

(*a*) All absences without leave will be tried by courts-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay. (The limit of punishing power of a special court.)

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believed I have observed, during this war.

(Signed by Gen. Ansell.)

EXHIBIT 2.

JANUARY 13, 1919.

MY DEAR GEN. CROWDER: I inclose herewith memorandum submitted to me by Gen. Ansell. It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose first, very unequal degrees of punishment, and second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

I am not able to gather from Gen. Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of case in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

Maj. Gen. ENOCH H. CROWDER,
Judge Advocate General.

EXHIBIT 3.

JANUARY 18, 1919.

Memorandum for the Secretary of War:

1. I have read over very carefully the brief of Gen. Ansell and your submission of it, inviting my attention to—

(*a*) Unequal punishments of courts-martial.

(*b*) System of war-time penalties which has grown up and which the ends of discipline and justice do not justify us in enforcing, now that hostilities have ceased.

2. In all the cases you have in mind the records have been reviewed in either this office or the branch office in France and found legally sufficient to sustain both the findings and the sentence, so that no issue arises in respect of any of them except the quantum of punishment.

3. To meet the situation in the future, I recommend that the following general order be cabled to all our commanding officers:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 16, 1916, is obvious. Where in exceptional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war would be, under all the circumstances of the case, clearly inadequate."

4. To meet the past situation, I propose that this office, after classifying the sentences imposed, shall proceed under approved rules to equalize punishment through recommendations of clemency.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 4.

WAR DEPARTMENT,
Washington, January 17, 1919.

1. In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges or a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing shall be made a matter of record.

2. Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war would be, under all the circumstances of the case, clearly inadequate.

EXHIBIT 5

WAR DEPARTMENT,
Washington, January 20, 1919.

Memorandum for Gen. Crowder:

I have read your memorandum of January 18 with regard to unequal punishments by courts-martial.

Paragraph 4 proposes the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency. I approve this recommendation and will be glad to have you undertake it.

The recommendation of paragraph 3 I have also approved, and directed that instructions as suggested be transmitted to the commanding officers.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 6.

OFFICE ORDER
No. 18. JANUARY 28, 1919.

Under date of January 13, 1919, the Secretary of War, in returning a memorandum submitted to him by the Acting Judge Advocate General of the Army, remarked as follows:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose, first, very unequal degrees of punishment, and, second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased."

In response to this memorandum the undersigned proposed, as a means of preventing any further accumulation of cases in which clemency would be necessary to prevent harshness and severity, which are unnecessary from the point of view of present disciplinary requirements, the issue of the following order:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in excep-

tional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

This order was approved and has been promulgated. To meet the past situation, the undersigned proposed that the Judge Advocate General's Office should classify sentences imposed and proceed, under approved rules, to equalize punishment through recommendation to clemency, which was approved by the Secretary of War.

In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment, but to adjust that punishment to present disciplinary requirements, a board to consist of (1) Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, (2) Col. John H. Wigmore, judge advocate, (3) Maj. Stevens Heckscher, judge advocate, is appointed to undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him. The board will meet at the earliest practicable date and submit for approval a plan of procedure looking to a speedy prosecution and completion of the duty imposed.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 7.

PLAN FOR CARRYING OUT WORK BY CLEMENCY BOARD APPOINTED UNDER OFFICE ORDER OF JANUARY 28, 1919.

1. In all cases of general prisoners the records of general courts-martial for offenses committed since the beginning of the war, excepting the cases to be reported upon in accordance with this plan by the commandants of the disciplinary barracks and its branches, will be examined in the first instance by a force of clerks and examining officers in the office of the Judge Advocate General, and the form hereto attached will be filled out in triplicate for each case by the clerk in charge, except items 27 and 41; item 27 will be filled in by the officer examining the record and item 41 by the board.

2. The several commandants of the United States disciplinary barracks and its branches at Fort Leavenworth, Alcatraz, and Fort Jay will make a report at the earliest practicable moment to the Judge Advocate General of the Army in the case of every prisoner confined under his charge for the conviction of an offense committed since the beginning of the war, which report will be upon said form hereto attached, which will be filled out in triplicate in each case except as to items 27 and 41; item 27 will be filled in by the examining officer in the office of the Judge Advocate General and item 41 by the board.

3. When the form in any case shall have been completed in the office of the Judge Advocate General, except for item 41, it, in triplicate, together with the court-martial record in the case, will be immediately transmitted to the clerk assigned to service with the board and by him placed before the board. The clemency board will thereupon make its study of the case, enter its recommendation on the form under item 41, and place the form before the Judge Advocate General for a signature or other action, and for transmission to the Secretary of War. In case the board is not unanimous, any disagreeing member may file a briefly expressed nonconcurring recommendation.

4. As soon as the clemency board has been provided with the necessary assistance, it shall proceed to give consideration to the cases of the prisoners confined in the penitentiaries, and also to the cases transmitted to the office by the commandants of the disciplinary barracks and its branches, as nearly as possible in the order in which they are received. It is understood that said commandants will give precedence of consideration to cases as the cases may, in their judgment, merit it. It is believed, however, and so recommended, that said commandants should consider and transmit to this office cases in the following order of precedence:

(*a*) Those in which, because of the present information of the commandant, he believes should be immediately released.

(*b*) Cases of desertion in which the prisoners surrendered.

(*c*) Cases in which the offenses were committed within the first four months of the prisoners' first service in the Army of the United States.

5. It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examnaton of the cases of those serving sentences of confinement within the United States, since it is thought that the obtaining of the necessary information and the relationship of the offense to the theater of war are considerations which would concur in such postponement.

6. The personnel to assist the clemency board in this work must consist of the outset of not less than 7 officers and 10 clerks. It is not at all certain that this number of officers and clerks will be found to be sufficient. The importance of this task is such, and so much depends upon its expeditious performance, that an inadequate commissioned clerical personnel is bound to embarrass, if not render abortive, the entire undertaking.

S. T. ANSELL,
J. H. WIGMORE,
S. HECKSCHER,
Members of the Clemency Board Appointed by Judge Advocate General.

Approved:
E. H. CROWDER,
Judge Advocate General.

EXHIBIT 8.

MARCH 5, 1919.

Memorandum for the clemency board:

1. Col. Wigmore and Maj. Heckscher have been relieved from the board and Col. Easby-Smith, Maj. Ashton, Maj. Rogers, and Lieut. Tittmann detailed to it.

2. The board will be divided into three divisions. The first division will consist of Col. Easby-Smith and Maj. Ashton; the second division, of Maj. Connor and Maj. Rogers; the third division, of Lieut. Col. Kraemer and Lieut. Tittmann. The president of the board will be an ex officio member of each division, and will sit with it whenever requested by either member of the division whenever there are disagreeing views in the division, and whenever on other occasions he deems it advisable to sit with it.

3. When the two members of a division concur upon a recommendation, it will be entered as a recommendation of the board. Nonconcurrences will be specially reported to the president of the board, and all recommendations will be presented to the president of the board for his consideration before presentation to the Judge Advocate General.

4. Maj. Connor will be in charge of the instruction of the working force.

S. T. ANSELL.

(I) EFFECTS OF CONVICTION BY COURT-MARTIAL.

Charge.—Gen. Ansell says that men convicted by courts-martial become "military pariahs"; and adds:

Of course, you have got some suggestion of that in the Articles of War themselves. At least one article forbids any association with convicted men. (P. 198.)

Answer.—The truth is to the contrary.

The article referred to, the forty-fourth article of war, is the single instance of prohibition of such association and applies only when an officer is dismissed from the service for cowardice or fraud and his crime and punishment have been published in the newspapers as provided by law. After such publication "it shall be scandalous for an officer to associate with him." (Article of War 44.)

(J) INVESTIGATION OF GEN. ANSELL'S ACCUSATIONS BY THE INSPECTOR GENERAL.

Charge.—Gen. Ansell says:

And then the Inspector General, in my judgment, forgetting whatever quasi judicial character belongs to his position—and there ought to be a great deal of it—said, "You know, I am making a report on this subject by order of the Secretary of War. This thing is in Congress, and my report will go to Congress, and, Ansell, when it goes to Congress it will be very detrimental to you." And I said, "Well, General, I would rather meet you in Congress than deal with you here." (P. 209.)

Answer.—The truth is to the contrary.

This committee is in possession of a letter from the Inspector General denying that this conversation or any such conversation ever took place.

V. Appellate Power: Various Ideas Submitted to Congress.

The following projects for conferring appellate power are before this committee:

(A) OPINION OF ATTORNEY GENERAL WIRT, SEPTEMBER 14, 1818.

By the Constitution, the President is made Commander in Chief of the Army and Navy of the United States. But, in a Government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the Constitution, the President is the national and proper depositary of the final appellate power, in all judicial matters touching the police of the Army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the Constitution. (Op. Atty. Gen. William Wirt, Sept. 14, 1818.)

(B) S. 3692 AND H. R. 9164, JANUARY, 1918.

Sec. 1199. The Judge Advocate General shall * * * report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction.

(C) PROPOSED JOINT RESOLUTION PREPARED FOR SENATOR McKELLAR, FEBRUARY 20, 1919.

* * * That the President be, and is hereby authorized, wherever the substantial justice of the case so requires, to correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact, and for that purpose to remove any record of dishonorable discharge and to make any other order appropriate in the premises, and for that purpose also to direct the submission of any or all records of court-martial judgments to the Judge Advocate General of the Army for his opinion and recommendation.

(D) GEN. CROWDER'S RECOMMENDATION IN HIS LETTER OF MARCH 10, 1919, TO THE SECRETARY OF WAR.

Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War January 19, 1918, which covers the ground more completely and more flexibly than the now pending bills, and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact."

This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters—the Judge Advocate General (p. 64).

(E) KERNAN BOARD REPORT, JULY 17, 1919.

Art. 50½. * * * the Judge Advocate General of the Army, who shall receive, cause to be recorded, examine and revise * * *. When such examination or revision discloses error or other cause requiring action by the President under the provisions of these articles the Judge Advocate General shall prepare a memorandum of his views and recommendations in relation thereto and submit it with the record of the case to the Secretary of War for the action of the President.

The President, as Commander in Chief, in any case tried by a general court-martial or military commission, may set aside, disapprove, or vacate any finding of guilty in whole or in part, or modify, vacate, or set aside any sentence in whole or in part, and direct the execution of the sentence as modified, and of such part thereof as has not been vacated or set aside. The President, as Commander in Chief, may set aside the entire proceedings in any case and, subject to the provision of this article, grant a new trial before such general court, military commission or special court as he may designate; or he may restore the accused to all rights as if no such trial had ever been held, and his necessary orders to this end shall be binding upon all departments and officers of the Government.

(F) S. 5320 (CHAMBERLAIN, JANUARY, 1919), H. R. 14883 (SIEGEL, JAN. 22, 1919), H. R. 15945 (JOHNSON, FEBRUARY, 1919), AND H. R. 431 (SIEGEL, MAY 19, 1919).

SEC. 1199. The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, * * *. The power to revise the proceedings of courts-martial conferred upon the Judge Advocate General by this section shall be exercised only for the correction of errors of law which have injuriously affected the substantial rights of an accused, and shall include—

(*a*) Power to disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the record requires such finding;

(*b*) Power to disapprove the whole or any part of a sentence;

(*c*) Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any. If upon revision, under this section, all the findings and the sentence be disapproved because of error of law in the proceedings, the convening or confirming authority may lawfully order a new trial by another court-martial.

Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment.

(G) S. J. RES. 18 (SENATOR M'KELLAR, MAY 20, 1919).

That the President be, and is hereby, authorized and requested to constitute appoint, and convene in the Judge Advocate General's Department as many reviewing boards, composed of five commissioned officers each, as he may deem necessary to do the work speedily, the duties of which boards shall be to reexamine and review the records of conviction in every court-martial or retirement case arising during the present war and since the Mexican disturbance prior thereto, except such case wherein convictions have already been set aside and fines and penalties remitted or returned to the soldier. The said records shall be assembled by and be under the direction of the Judge Advocate General and distributed to said boards in such manner as he may deem best, and said boards shall examine into all questions both of law and of facts, and in addition they shall examine any new or additional facts which any defendant may bring before them by way of affidavits, to the end that said reviewing boards may hear and determine each case anew on the law and the facts of the record, together with such additional facts as may be adduced, and decide the cases as speedily as possible, according to the equity and justice thereof. In reaching their conclusions, the boards shall take into consideration the punishment already inflicted in each and every case, but they shall not consider the findings and judgments of the courts-martial or retirement boards as binding upon them, inasmuch as the war is over and it may not now be necessary to continue many punishments which were absolutely necessary to be inflicted in order to preserve proper military discipline during a state of war; and it shall be their duty, whenever the justice of the case may require it, to change, reverse, alter, mitigate, set aside, annul, or confirm the findings of any court-martial or retirement board convened during the present war or since the Mexican disturbance prior thereto. Such boards shall have the power and it shall be their duty in proper cases to set aside and held for naught orders of dishonorable discharges inflicted as punishment in courts-martial or retirement cases, and to enter orders granting honorable discharges or retirements, which orders shall be filed of record in the proper department containing the record of such discharged soldiers. Each board shall act by majority vote, and each board shall select its own chairman without regard to the rank of the officer. In the selection of such boards no officer shall be appointed thereon who has taken part in any court-martial or retirement trial or who

has reviewed any record arising since the beginning of the present war or since the Mexican disturbance prior thereto. * * * When an opinion shall be reached, the same shall be immediately forwarded to the President by the Judge Advocate General, with the recommendation of such board. If the President approves the finding of the board, the same shall be final; but he is further authorized and empowered to enter any order or judgment in any case, whether of mitigation or anulment, in whole or in part, of any court-martial proceeding or finding or of any finding of such boards, or he pay parole or pardon, to the end that even and exact justice shall be done in each case.

(H) S. 64 AND H. R. 367 (ANSELL BILL, MAY, 1919).

Art. 52. *Revision by court of military appeals.*—* * * shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; and such power of review shall include the power—

(*a*) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

(*b*) To disapprove the whole or any part of a sentence.

(*c*) To advise the proper convening or confirming authority of the further proceedings that may and should be had, if any, upon the disapproval of the whole of a sentence; and in any case in which all the findings and the sentence are disapproved because of such error of law in the proceedings the appointing authority may lawfully order a new trial by another court.

(*d*) To make a report to the Secretary of War for transmission to the President, recommending clemency in any case in which the sentence, though valid, shall appear to the court to be unjust or unduly severe. * * * And said court of military appeals shall have like jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence, upon application to that end made by the accused within six months after the passage of this act: *Provided*, That no case in which the sentence has heretofore been approved shall be tried again: *And provided further*, That the revision or reversal of the sentence in any such case shall not be effective to retain in the military service any person who has been dismissed or discharged therefrom in execution of such sentence thus reviewed, or to entitle any person to any pay or allowances, but shall be limited in its effect to the final determination that the separation from the service was honorable instead of dishonorable.

(I) H. R. 9156 (SEPT. 9. 1919, DALLINGER BILL).

Art. 6. *Supreme court of military justice.*—* * * shall hear and decide all cases which may be submitted to it on appeal from any military court of appeal, and its decision shall be final. It shall have the power—

(1) To disapprove a finding of "guilty" and to make a finding of "not guilty";

(2) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(3) To disapprove the whole or any part of a sentence and to impose such sentence as it may deem just; and

(4) To order a new trial before a regimental court or before a court of military appeal. * * * shall have jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence, upon application to that end made by the accused within six months after the passsage of this act: *Provided*, That no case in which the sentence has heretofore been approved shall be tried again: *And provided further*, That the revision or reversal of the sentence in any such case shall not be effective to retain in the military service any person who has been dismissed or discharged therefrom in execution of such sentence thus reviewed, or to entitle any person to any pay or allowances, but shall be limited in its effect to the final determination that the separation from the service was honorable instead of dishonorable.

VI. Tabular Statement of the Organization of British and French Military Tribunals.

(Memorandum by Lieut. Col. William C. Rigby, Judge Advocate.)

(A) ORGANIZATION OF BRITISH COURTS.

1. General courts-martial:

Nine or more members, all officers; in practice usually 9 or 11; commissioned at least 3 years.

Judge advocate (impartial legal adviser), prosecutor and counsel for accused. Judge advocate advises but does not govern the court.

NOTE.—"(F) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not overrule it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point. The court, in following the opinion of the judge advocate on a legal point, may record that they have decided in consequence of that opinion." (Rules of Procedure, par. 103 (F).)

Record forwarded (within the United Kingdom) by commanding general to J. A. G. without action, but with his recommendations.

Stenographic transcript taken; record very much like American G. C. M.

Practically officers' court within United Kingdom. Seldom used for enlisted men except in war time in serious cases where death or penal servitude is contemplated, which the district C. M. can not award. In peace time all civil crimes habitually turned over to civilian courts for trial. Only 12 G. C. M.'s held within the United Kingdom during the 9 years, 1905–1913 ($1\frac{1}{3}$ G. C. M.'s per annum).

"Members under instruction" usually appointed. They take no part in the proceedings but sit with the court both in open and closed sessions for the purpose merely of learning the procedure.

"Waiting members." Two or three "waiting members" usually appointed as alternates to act in case of absence or disqualification of regular members. "Waiting members" are excused as soon as the court is sworn.

At least five judges must be of rank not below captain; the president must not be under field rank (unless in emergency).

Death sentence requires two-thirds vote.

2. District court-martial:

Three or more officers (in practice usually three, sometimes five).

May award confinement and forfeiture of pay up to two years.

Is the ordinary court for trying enlisted men within the United Kingdom. (Average D. C. M. trials, 1904–1913, inclusive, ran about 3,800 per annum with an average army stationed within the United Kingdom of about 125,000 men, about one-half of the total standing British Army, the other half being engaged in service overseas.)

Not usually attended by a judge advocate (convening authority may appoint judge advocate, but rarely does). Prosecutor is usually an officer from accused's regiment—often the battalion adjutant.

Accused does not usually have counsel, though it is permitted.

No stenographic record.

Since institution of "court-martial officers" under War Office instructions of September, 1916, president is often a court-martial officer (that is, an officer with legal training corresponding roughly to an officer of our J. A. G. D.), but this is not required.

Findings and sentence are approved by the authority appointing the court (usually a brigade or territorial commander). After confirmation the record is sent for review to the J. A. G.

D. C. M. is rarely used outside of the United Kingdom (replaced by field G. C. M. on active service).

May not try officers nor award death nor penal servitude.

Judges must have been commissioned two years.

3. Regimental court-martial:

Not less than three officers of the regiment, appointed by the regimental commander.

Proceedings confirmed by regimental commander.

Limit of punishment 42 days' detention.

May not award imprisonment, discharge with ignominy, penal servitude, nor death; nor try an officer.

Each member commissioned at least one year. President not under the rank of captain (unless in emergency).

R. C. M. almost obsolete since extension in 1910 of power of commanding officers to award up to 28 days' detention without court-martial (Army act, sec. 46).

4. Field general court-martial.

The court habitually used on active service outside of the United Kingdom.

Jurisdiction over both officers and men, all offenses.

May award death, penal servitude, imprisonment, detention, field punishment, forfeiture of pay, restriction to limits, etc. Full jurisdiction of a G. C. M.

Normally consists of at least three officers. No requirement as to length of commission.

May consist of but two officers, but in such case may not award death or penal servitude.

No stenographic record; rules of procedure are not binding, but the spirit of the rules to be applied so far as practicable.

Is intended to have a summary procedure adapted to the requirements of active service.

Death sentence requires unanimous vote. Sentence is confirmed by commanding general appointing the court; but sentence of death or penal servitude requires confirmation of the commander in chief of the force (e. g., expeditionary force in France, forces in Palestine, in Mesopotamia, etc.).

In practice reviewed by the deputy judge advocate general before confirmation by the commander in chief; after confirmation, forwarded to the judge advocate general for review (but death sentences carried into execution upon confirmation by the commander in chief; records of such death sentences not afterward reviewed by judge advocate general, but merely filed in his office).

"Court-martial officer" (analogous to officer of our J. A. G. D.) appointed as additional member of F. G. C. M., sits only in the trial of such cases as the convening authority directs as being "difficult, complicated, or serious"; usually cases where death or penal servitude likely to be awarded or where the offense is a civil crime.

5. Judge advocate general:
Reviews:
(*a*) Before confirmation, general courts-martial within United Kingdom.
(*b*) After confirmation—
1. District courts-martial wherever held.
2. Field general courts-martial wherever held.
3. General courts-martial held outside United Kingdom.

NOTE.—Jurisdiction extends throughout the British Empire, except India, for which there is a separate judge advocate general. Acts also for the air forces under the ministry of air (at present Hon. Winston Churchill is minister for air, as well as secretary of state for war).

Civilian; permanent appointment; retires at 65 years of age; salary, £2,000 per annum.

Functions advisory only; reports to secretary of state for war through deputy adjutant general (army council).

Records and judge advocate general's recommendations are in fact carefully examined by the deputy adjutant general (at present Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B.), who, though he usually agrees with the judge advocate general, feels under no obligation to do so, and is not bound in any way by judge advocate general's opinion. If he disagrees, they consult; if they still disagree, refer to attorney general. If, after conference, attorney general differs from judge advocate general, goes to secretary of state for war for decision, with understanding that he will rather be guided by attorney general's advice than by judge advocate general, because attorney general is adviser to whole Government, whereas judge advocate general is adviser only to war department.

After confirmation, sovereign (that is, in effect, the secretary of state for war) has power to "quash"; judge advocate general, therefore, may recommend "quashal." Statistics show a trifle over 1 per cent of all cases coming through judge advocate general's office during the war were so quashed after confirmation.

Petitions are also received at any time after conviction on behalf of the accused. The record is then reexamined and the conviction sometimes quashed—practically an appeal.

NOTE.—Power to quash and to entertain such petitions is analogous to appellate power sought by proposed amendment to Revised Statutes 1199, in January, 1918.

6. "Military courts":
Try prisoners of war and civilians; analogous to our military commissions.

(B) ORGANIZATION OF FRENCH COURTS.

1. Conseil de Guerre in the territorial armies:
Permanent court organized in each military territorial district.
Seven judges appointed by commanding general by roster for six months—
(*a*) For the trial of an officer—all officers.
(*b*) For trial of an enlisted man, one noncommissioned officer on the court (usually "adjutant," corresponding to our regimental or battalion sergeant major).

Commissaire du Gouvernement prosecutor and legal adviser to the court; appointed by minister of war; an officer not under the rank of

captain, 25 years of age. Not required to be a lawyer. (In practice may or may not be a lawyer. In Paris, this spring, exactly 50 per cent were lawyers—six courts sitting, three commissaires officers who were lawyers, and the other three officers without legal training.)

If accused has no counsel, court appoints counsel. May be officer, soldier, or civilian. The court has power to appoint civilian counsel, who must then serve without compensation (like counsel appointed by civilian judge to defend accused in criminal cases).

The president questions accused and other witnesses. No record of testimony kept. Statements taken before investigating officer (rapporteur), read as evidence. Witnesses usually called, but not strictly necessary.

Rapporteur (investigating officer) appointed for each court by minister of war. Army officer, not under captain, 25 years age; no other requirements; not required to be a lawyer. In practice may or may not be a lawyer. Endeavor made during the war to secure officers with legal training, but not always possible to do so.

2. Conseil de Guerre in armies on active service (or in a "state of siege"):

Five judges appointed by commanding general, to serve at his pleasure.

For trial of enlisted men, one judge, a noncommissioned officer (usually "adjutant," that is, regimental or battalion sergeant major).

Functions of commissaire and rapporteur combined in one officer, "commissaire-rapporteur"; appointed by commanding general; of rank not under captain, 25 years of age. Not required to be a lawyer —sometimes is and sometimes is not. Endeavor made during the war to procure lawyers for these positions.

No preliminary investigation whatever required. Commanding general may, in his discretion, by "direct order" (sec. 156, C. J. M.), order case to trial; or may order investigation.

3. "Special courts":

Emergency war boards established for the war by presidential decree September 6, 1914 (abolished by law in 1918).

Three judges appointed by commanding general, to serve at his pleasure. President an officer, not under field rank. Other two judges—(*a*) For trial of officers—officers; (*b*) for trial of enlisted man or civilian—one officer and one noncommissioned officer.

Commissaire-rapporteur appointed by the commanding general; required only to be an officer.

No preliminary investigation required; accused may be instantly ordered to trial. (The 24-hour interval before trial allowed accused in the ordinary conseil de guerre in the armies in active service, was not required in these "special courts").

Counsel for the accused appointed by the order referring case for trial; accused advised of the counsel appointed; allowed to choose other counsel if he so desires.

No appeal; sentences instantly carried into execution (except that execution of the death sentence required the order of the commanding officer who ordered the case for trial. This officer had the right in exceptional cases to delay the execution and ask the pleasure of the President of the Republic. In 1917 it was directed that all death sentences should thereafter be so referred to the President).

4. Court of Revision in the territorial armies:

Permanent courts of revision established at Paris, Bordeaux, Lyons. Territorial jurisdiction; Republic divided between them. Another court in Algiers.

Five judges, two civilians, three officers, as follows: Civilian president (a "president of the chamber of the (civilian) court of appeals"), civilian (a judge of the court of appeals), one colonel or lieutenant colonel, two majors.

Military judges appointed by commanding general for six months; civilian judges appointed as directed by the Government (cabinet). Each judge, civilian or military, must be 30 years of age. Military judges not required to have legal training.

Commissaire du gouvernement legal adviser to the court; a field officer, 30 years of age, appointed by the minister of war; not required to have legal training but in practice usually is a lawyer. (Col. Augier, commissaire du gouvernement of the court of revision at Paris, is a very eminent military lawyer and the author of several books on military law.)

Reviews for errors of law only. Appeals must be made within 24 hours after judgment in the court below. One day further allowed counsel for accused to file "memoir"; three days for one of the judges to report on the case to the court. The court then sits in public session; hears arguments from commissaire du gouvernement and counsel for the accused and enters judgment. (In practice additional time is sometimes allowed for preparation of the accused's "memoir.")

New trials may be ordered. The case is then sent for trial to some other court than the court which tried it the first time.

5. Court of revision in the armies on active service:

At headquarters of each division and army.

Five judges, all officers, as follows: One brigadier general (president), two colonels or lieutenant colonels, two majors. Appointed by commanding general, to serve at his pleasure.

Commissaire du gouvernement, officer of field rank, 30 years of age; appointed by the commanding general.

Jurisdiction and procedure as in territorial armies, except that in practice the time for accused to file his "memoir" is almost never extended.

In emergency the number of judges may be reduced to three.

6. Court of cassation:

Civilians (but not military persons) may have recourse to the court of cassation (supreme court of Republic of France) on jurisdictional questions only. This right is suspended whenever ordinary appeals to the courts of revision are suspended.

In time of peace, court of cassation exercises powers of court of revision (which is then suspended).

7. All right of appeal may be suspended during war or state of siege by presidential decree.

No appeal or other recourse lay from the "special courts" (emergency war courts). See above.

VII. Gen. Ansell's Accusations Against Others Besides Gen. Crowder.

(A) AGAINST GENERALS OF THE ARMY.

(*a*) "The weakest grade in the Army of the United States" (p. 121); which is the grade from which are drawn convening and reviewing authorities of courts-martial.

(*b*) "Many of them jokes to everybody else in the world except ourselves and themselves" (p. 121).

(*c*) "Lacking in experience" (p. 121); citing Gens. Pershing and Wood as examples, and saying:

(*d*) "That heterogeneous collection of troops on the Mexican border," "which Gen. Pershing commanded"; "no professional soldier would ever call that a division" (p. 122); and "the command in the Philippines was not the kind of command that required general leadership" (p. 122); and again:

(*e*) "I have had a hundred times their court-martial experience" (p. 121).

(B) AGAINST THE INSPECTOR GENERAL.

(*a*) "Thoroughly reactionary" (p. 116); "the most reactionary of men"; "prejudiced and reactionary" (p. 173); "whose views savor of professional absolutism" (p. 123).

(*b*) With trying to browbeat and intimidate Gen. Ansell, in connection with the investigation of Gen. Ansell's part in the present controversy, in trying to compel Gen. Ansell to make a statement against his will by threatening that "this thing is in Congress, and my report will go to Congress, and, Ansell, when it gets to Congress, it will be very detrimental to you" (p. 209).

(*c*) "With habitually using the power of his office in connection with investigations to compel accused persons and others to make statements against their will and to incriminate themselves, by menaces, threats, and intimidation" (p. 209).

(*d*) With allowing officers in his department in camp and division to compel testimony from suspected or accused soldiers, and then use it against them (p. 209).

(*e*) With having taken part with the Secretary of War and the Acting Judge Advocate General (Gen. Kreger) in frequent conferences with the court-martial committee of the American Bar Association, under such circumstances that "I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

(C) AGAINST GEN. BIDDLE, FORMER ASSISTANT CHIEF OF STAFF.

(*a*) "Thoroughly reactionary" (p. 116).

(*b*) "Sharing with the Inspector General in views that savor of professional absolutism" (p. 123).

(D) AGAINST MAJ. GEN. KERNAN, MAJ. GEN. O'RYAN, AND LIEUT. COL. OGDEN, THE MEMBERS OF THE KERNAN-O'RYAN-OGDEN BOARD, AND LIEUT. COL. BARROWS, THE RECORDER OF THAT BOARD.

(*a*) "The most reactionary set of men in the United States" (p. 215).

(*b*) So prejudiced, and known to be so prejudiced, that many officers of high rank, holding liberal views, refused to express their views on military justice to that board (p. 215).

(E) AGAINST BRIG. GEN. E. A. KREGER, ACTING JUDGE ADVOCATE GENERAL OF THE ARMY.

(*a*) Not understanding his office; "brought to an office that he did not understand, and does not understand yet" (p. 165).

(*b*) With being opposed to and obstructing real clemency to prisoners (pp. 192–195, 204).

(*c*) With planning to disband the clemency board before it had considered the cases of prisoners from Europe (pp. 204–205), and with saying that the cases of those over there "would not require a second examination over here" (p. 207).

(*d*) With being, along with the Secretary of War, and the Judge Advocate General, in the attitude of "obstructing" the administration of clemency—"one of the obstructing officers" (p. 203).

(*e*) With pursuing (jointly with the Secretary of War, the Judge Advocate General, and the Inspector General) such methods with respect to the investigation conducted by the committee of the American Bar Association that "that investigation was never a fair investigation," but was so arranged that "that Bar Association committee sat there and heard and drank in the ultramilitary view, and they heard nothing else, except as I, single-handed, aided by one other officer, could present," "so that the departmental view might be impregnably maintained" (pp. 210, 211).

(*f*) With being, along with the Secretary of War and the Inspector General "in frequent contact" with the members of the American Bar Association committee, under such circumstances that "I for one, as long as I live, will express no respect for any such committee, no matter how high it may be, or whatever association it may be a part of" (pp. 211, 214).

(*g*) With having unjustly, in an unusual and harsh manner, and without notice, removed Col. Weeks, a Regular Army officer, "a distinguished officer," from duty in the office of the Judge Advocate General in Washington, to a relatively obscure station, which will carry immediate reduction to his Regular Army rank, because of his liberal views on clemency and concerning the system of the administration of military justice (pp. 162–163).

(F) AGAINST FORMER PRESIDENT TAFT.

(*a*) Perverting "his power to the furtherance of a plan * * * to maintain the existing vicious system of military justice and to do me great personal injury" (statement of Gen. Ansell, New York World, Sept. 16, 1919).

(*b*) Abusing "the confidence and trust of the American people and" misleading "them" (ibid); and

(c) Debasing "his exalted position as ex-President of the Republic to become an ignorant and bitter partisan in behalf of his friend," Gen. Crowder (ibid).

(G) AGAINST THE CHIEF OF STAFF.

(a) With joining with the Secretary of War, the Judge Advocate General, and the Acting Judge Advocate General in getting in touch and conferring with the court-martial committee of the American Bar Association (p. 211), so influencing that committee and its work that "its investigation was never a fair investigation."

(b) With joining "the whole military hierarchy, capped by your Chief of Staff," in clamoring and entering "into an agreement that these men should die," i. e., Ledoyen, Fishback, Sebastian, and Cook, "the four death cases from France," to whom the President showed clemency.

(H) AGAINST CHIEFS OF BUREAUS.

(a) Joining "to protest and resist the establishment of any revisory power in the War Department" (p. 207), and

(b) Inducing the Secretary of War "by an organized military bureaucracy to use the great power of his office to oppress, to destroy any who would dare differ with that bureaucracy" (p. 171).

(I) AGAINST THE COURT-MARTIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

(a) "Being a packed committee" (p. 211), "chosen as a result * * * of strenuous efforts being made by the War Department to bolster up their cause" (p. 214).

(b) That certain members of the committee "came to the investigation with minds foreclosed" (pp. 212–213), and that those members "have not been without their influence upon the other members of the committee" (p. 213).

(c) With so misconducting their investigation that "that investigation was never a fair investigation" (p. 210), and that "the hearing has not been thorough and it has not been fair" (p. 214).

(d) With misconducting their investigation in that "that committee * * * came here, got into touch with the War Department and the Judge Advocate General of the Army, got a list of witnesses from them, and called those witnesses and no other witnesses until just about four days before their hearings, which had extended over four or five weeks, were about to close. They then, condescendingly, gave me an opportunity to appear and called one other officer voicing my views, and then they asked me if I had a list of names * * * in advocacy of my side of the matter, and when I handed in that list they left * * * within 48 hours before any but one of those gentlemen could get here" (p. 210); "and so that Bar Association committee sat there and heard and drank in the ultramilitary view, and they heard nothing else except as I, single-handed, aided by one other officer, could present" (p. 210).

(e) With conferring "with the Secretary of War, the Chief of Staff, the Judge Advocate General of the Army, and the Acting Judge Advocate General of the Army" (p. 211), and with being "in frequent con-

tact with the Secretary of War and the Acting Judge Advocate General and the Inspector General" (p. 214), so that "whatever respect anybody else may have for such a committee I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

(*f*) "The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense" (p. 213).

(J) AGAINST THE SECRETARY OF WAR.

(*a*) "Thoroughly reactionary" (p. 116);

(*b*) With having submitted to Congress "in bad faith, not really desiring the bill passed nor wanting any such power granted (p. 111), on January 19, 1918, a bill to vest in the President revisory power over the findings and sentences of courts-martial" (p. 111);

(*c*) With having "arrayed himself with the solid phalanx of the Army—principally of the Regular Army—in support of this system" (p. 173); i. e., in support of the existing system of military justice, elsewhere in the testimony denounced as a "system of organized injustice";

(*d*) With being "content, however, to be imposed upon" (p. 117);

(*e*) With having, along with the Judge Advocate General, "resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation" (p. 169);

(*f*) With having been "induced by an organized military bureaucracy to use the great power of his office to oppress, to destroy, anyone who would dare differ with that bureaucracy" (p. 171);

(*g*) With having "demoted" or concurred in the demoting of Gen. Ansell from the rank of temporary brigadier general to his Regular Army grade of lieutenant colonel, within but little more than a month after bestowing upon him the distinguished service medal, as a punishment for testifying before the Senate Military Affairs Committee; not for stating other than the truth, but for "divulging the secrets of the system, giving away State secrets, things that we want to keep away from Congress and the public" (p. 161); with withholding the order so that it would not be published until the day after Congress adjourned last March (p. 164); and with pretending that "my demotion had absolutely nothing to do with my connection with the criticism of the existing system" (p. 164);

(*h*) With sending clear to France to get another brigadier general to put in Gen. Ansell's place as Acting Judge Advocate General (p. 164), who (Gen. Kreger) did not understand the office to which he was brought, "and does not understand yet" (p. 165);

(*i*) With having pretended that Gen. Ansell's demotion "was in line with the general demobilization of the Judge Advocate General's Department; that there were to be no more promotions in that department"; yet with having made "more colonels in that department since I was demoted than before" (p. 164);

(*j*) With having failed to make any fair investigation of charges against the Army court-martial system (p. 167); but, on the contrary

(*k*) With having entered into a deliberate conspiracy with the Judge Advocate General and Col. John H. Wigmore for "a plan of campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants" (pp. 165–6); and for that purpose—

(*l*) With establishing a "propaganda bureau" with "several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries" (p. 168);

(*m*) With having, through this "propaganda bureau," in pursuance of this conspiracy, prepared "a statement for the press," devoted largely to discrediting me" (p. 166);

(*n*) With having, through this "bureau," published another "very elaborate" 70-page statement "devoted to enconiums upon the system" (Gen. Crowder's letter of Mar. 10, 1918), of which 90,000 copies were sent out (p. 168), "as part of the propaganda to maintain this system and to discredit those who would attack it"; and that "the truth is not in that document," and that the cases cited in that document "are not only not fairly handled, they are falsely and untruthfully presented" (p. 169); "all with the purpose that the Congress of the United and the lawyers of the United States might be misled and deceived" (p. 169);

(*o*) With having appointed to investigate the subject of military justice and Gen. Ansell's own part in it, "the Inspector General, the most reactionary of men" * * * "the very man whom in the brief," prepared by Gen. Ansell in December, 1917, upon the power of the Judge Advocate General, "I labeled as prejudiced and reactionary" (p. 173);

(*p*) With having, in November, 1917, directed or consented that the Judge Advocate General relieve Gen. Ansell from all connection with the administration of military justice because of the latter's liberal views (p. 183);

(*q*) With having opposed clemency to prisoners, "the departmental line-up was against clemency" (p. 182), and with having, when the clemency board was finally instituted last winter, decided that the cases of prisoners overseas should not be taken up, because "they were over there * * * and that people would not be so interested in extending clemency to prisoners so circumstanced as here at home" (p. 191);

(*r*) With being, along with the Judge Advocate General and Gen. Kreger, in the attitude of "obstructing" the administration of clemency (p. 203);

(*s*) With having arranged to mislead the committee of the American Bar Association investigating court-martial procedure, by facilitating the appearance before it of witnesses favorable to "the system" and obstructing the appearance of other military witnesses before it, so that the investigation of that committee "was never a fair investigation" (p. 210); and even that

(*t*) The members of that committee itself "were chosen as the result of strenuous efforts made by the War Department to bolster up their cause" (p. 214);

(*u*) With having, immediately upon his return from Europe last May, because "it was in the air" that the American Bar Association

committee's report might be unfavorable to the department (pp. 214–15), appointed another committee—the Kernan-O'Ryan-Ogden Board—composed of "the most reactionary set of men in the United States" (p. 215);

(*v*) In short, with being wholly dominated by the reactionary views of the Judge Advocate General and of the most reactionary section of the Army, and being willing to stoop to any means whatever to prevent any improvement and to destroy anyone seeking to disturb the present system.

(K) AGAINST PROF. JOHN H. WIGMORE.

Prof. John H. Wigmore, dean of the law school of Northwestern University, author of "Wigmore on Evidence" and many other books, and known throughout the world as one of the foremost legal authorities in the United States, formerly a colonel in the Judge Advocate General's Department, has been denounced as:

(*a*) "A new thought man in the legal world" (p. 265), to whom "the Constitution does not mean very much", to whom the Constitution "seems to have been the result of a long course of foolish thought by our people" (p. 265);

(*b*) With being a man opposed to clemency, or "not zealous in according clemency" (pp. 191–192);

(*c*) With having entered, with the Secretary of War and the Judge Advocate General, into a conspiracy and "Campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants" (pp. 166, 231); and with having become chief of the "propaganda bureau" organized pursuant to that conspiracy (p. 168), with 13 or 14 clerks under him, assigned solely for that purpose, with their salaries paid by the Government (p. 168);

(*d*) With having, as chief of that "propaganda bureau," prepared first, a long statement, signed by the Judge Advocate General, devoted to discrediting and destroying Gen. Ansell (p. 166), and thereafter the 70-page pamphlet letter of the Judge Advocate General to the Secretary of War on "Military Justice during the War," dated March 10, 1919, of which 90,000 copies were "published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this system and discredit those who would attack it" (pp. 168–169, 231, 232); and that

(*e*) "The truth is not in that document"; that the cases cited in that document "are not only not fairly handled, they are falsely and untruthfully presented" (p. 169);

(*f*) With employing, along with the Secretary of War and the Judge Advocate General, such methods "as when employed in private affairs habitually receive the condemnation of honest men and discredit any cause" (p. 231).

VIII. Summary of the Inspector General's Findings.

The Inspector General, after a painstaking investigation of the facts in controversy, made a detailed report to the Secretary of War May 8, 1919. The report contained specific findings supported by the facts upon which they are based, adverse to the contentions of Gen. Ansell, as follows:

1. "Gen. Ansell's charge that he was relieved from duty as Acting Judge Advocate General, by reason of the difference of opinion as to section 1199, Revised Statutes, is without foundation in fact." (P. 10.)

2. "His (Gen. Ansell's) statement, repeatedly made, that General Orders No. 7, adopted to carry out the very views which he, himself, first advocated, were 'an administrative palliative,' is not in accord with the facts and is another instance where the public has been misled." (P. 17.)

3. "The fact remains that, at the time the order was issued, Gen. Crowder was Judge Advocate General of the Army and should have been consulted by his assistant, Gen. Ansell, in regard to a change of policy so radical as that effected by General Orders No. 84 and known by Gen. Ansell to be contrary to the declared policy of the Judge Advocate General and the Secretary of War." (P. 22.)

4. "From the records and from all obtainable evidence, it appears that Gen. Ansell's statement that, from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts. On the contrary, it appears that his initiative and authority as senior assistant remained undisturbed and that he was in no degree hampered in any changes which, within the law, he desired to make." (P. 26.)

5. "The above facts, stripped of all elements of uncertainty, lead to the conviction that Gen. Ansell's statements (concerning the four death cases from France) as to his attitude and activities in connection with the cases above considered, are misleading and widely variant from the facts." (P. 31.)

6. "Gen. Ansell does not claim that he originated the idea (clemency boards), but that the basis for the plan was his memorandum dated January 11, 1919. That is true. The Secretary of War, however, himself made the initial suggestion, and the order creating the board followed the lines laid down by him." (P. 36.)

7. "It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose." (P. 57.)

IX. Gen. Crowder's Attitude Toward Return of Acquittals for Reconsideration.

NOTE.—This is now ancient history, since it has been prohibited by General Order No. 88, War Department, July 14, 1919, which was recommended by Gen. Crowder.

(A) CHARGE OF GEN. ANSELL RESPECTING THE RETURN TO COURT OF ACQUITTALS.

Gen. Ansell before the Committee on Military Affairs, replying to a question by Senator Chamberlain, inquiring whether or not the War Department had not recently issued an order prohibiting the return

to courts by reviewing authorities of acquittals for reconsideration said:

Yes; although that has been agitated for 18 years, I know, and the War Department has insisted that that was a proper thing, and the Judge Advocate General of the Army, in the very hearings before the committee, beginning in 1912 and terminating in 1916, insisted that that was a proper thing, that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1918 conferring this revisory power, he went before the House Committee and argued for the advisability of permitting this court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to (p. 127).

Answer.—A careful examination of the hearings of 1912 and 1916 on the 1916 revision has been made, with the result that there is not found therein any reference by Gen. Crowder to the practice of reviewing authorities returning acquittals to courts for reconsideration.

In the hearings before the House Committee on the bill to place in the President revisory power, Gen. Crowder stated the following respecting the return of acquittals to courts by reviewing authorities:

It has been permissible ever since we have had an Army for the President, in any case requiring his action, to return the case to the court and ask them to reconsider the sentence, with a view to imposing a more adequate sentence or a different form of sentence, but there is no power in the President of the United States or the Secretary of War or any authority to increase the punishment beyond what the court will sanction on reconsideration (p. 37).

He has always had that power (referring to the power of the reviewing authority to return the finding and sentence to a court indicating the punishment inadequate). They have it under the English articles, from which we draw our own. They have had it from time immemorial; it has been the rule that the convening authority could address the trial court upon the adequacy or inadequacy of the judgment and sentence of the court (p. 40).

The commanding general can not increase it (referring to the punishment). He can only address the court as to the sufficiency of the sentence. That has been the law ever since we have had a Government, and ever since we have had an Army, and that is the law in England, going back as far as our written codes go (p. 42).

I have had cases come up where a very small sentence was given for the gravest crime, and I do not know anything that would attack discipline more, if the commanding general, who is also the reviewing officer, or the Secretary of War or the President, who will become the reviewing officers of that class of cases under this legislation, could not invite the attention of the court to the effect of such a sentence upon the discipline of the Army generally. I do not think this would have survived all the centuries without criticism if it were intrinsically wrong (p. 42).

I believe a large number of the cases returned by the convening authorities to courts-martial are with a view to imposing a different form of sentence and frequently a more lenient one (p. 43).

Gen. Crowder stated at this hearing that in perhaps a majority of cases the courts adhered to their original sentences upon reconsideration, adding:

There is a great deal of independence. You will find, I think, more cases where the reviewing authority, in commenting upon a case, in the order of promulgation, disapproves than you will find where the reviewing authority approves the action of a court upon revision (p. 44).

On February 26, 1919, Gen. Crowder before the Senate Military Committee in discussing the provision in the Chamberlain bill, which attempts to preclude the reviewing authority from returning to courts acquittals for reconsideration, stated, referring to the practice of returning acquittals:

Let me say, first, it is simply a regulation and there is no law under which it is done. The War Department could wipe out the regulation to-night and could establish this very prohibition by an order (p. 247).

Further in this hearing Gen. Crowder stated, in commenting upon the power of the reviewing authority to return acquittals, that:

I think this way about it: It shocks the American people to have a verdict of acquittal reconsidered, and for that reason I am not disposed to insist upon continuing the ancient rule of returning them. I have never known, in a rather protracted period of service, of an innocent man who has suffered through this procedure, and I have certainly known of many miscarriages of justice that have been corrected (p. 254).

I am not disposed to insist upon retention of that rule. I have sometimes thought we would be justified in revoking the present rule and try out the other system of reporting the result at the proper time, but I fear we should get all kinds of protest from the reviewing authorities, commanding officers who have authority to convene courts-martial (p. 255).

Subsequent to the hearing of February 26, 1919, Gen. Crowder directed the preparation of a draft of general order to prohibit reviewing authorities from returning acquittals to courts. As a result of this movement in this matter, General Order No. 88, War Department, 1919, was published on July 14, 1919, wherein it is provided:

1. No authority will return a record of trial to any military tribunal for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty on a specification laid under that charge which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited.

3. This order will be effective from and after August 10, 1919.

(B) SAME SUBJECT: GEN. CROWDER'S ATTITUDE.

Charge.—On page 127 of the report of the hearings, Senator Chamberlain interrogated Gen. Ansell respecting the sending back of a case of acquittal, and Gen. Ansell replied, saying:

The Judge Advocate General of the Army, in the very hearings before the committee beginning in 1912 and terminating in 1916, insisted that that was a proper thing; that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1913 conferring this revisory power he went before the House committee and argued for the advisability of permitting the court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to (p. 127).

Answer.—The reference here is without any doubt to the hearing on H. R. 23628, the original of the 1916 revision, before the House committee—the hearings beginning in April, 1912; and also to the hearings on S. 3191 before the Senate Subcommittee on Military Affairs in February of 1916, and, as I have said, these are the antecedents of the much-talked-of revision of 1916. Gen. Ansell says in these hearings that I argued for the advisability of permitting the court to reverse acquittals. A very careful examination of these hearings has been made which disclosed that nothing whatever was said by me upon that subject.

Gen. Ansell further says that I came before this committee in the spring of 1918 and argued for the advisability of permitting the court to reverse acquittals. What I said was this: Senator Wadsworth

asked whether or not I had any comments to make generally on the power of reviewing authorities returning papers after acquittals, and I said:

I think this way about it: It shocks the American poeple to have a verdict of acquittal reconsidered, and for that reason I am not disposed to insist upon continuing the ancient rule of returning them. I have never known, in a rather protracted period of service, of an innocent man who has suffered through this procedure, and I have certainly known of many miscarriages of justice that have been corrected.

On the closely related subject of the practice of reviewing authorities sending inadequate sentences back for revision upward I said:

I have a number of cases which I want to put in the record in order that you may see the use that military authorities make of this power of sending inadequate sentences back for revision upward, and see whether it is an abuse or not. I am not disposed to insist upon retention of that rule. I have sometimes thought that we would be justified in revoking the present rule and trying out the other system of reporting the result at the proper time, but I fear we should get all kinds of protests from the reviewing authorities, commanding officers, who have the authority to convene courts-martial (pp. 254-255, hearings on S. 5320).

I have been entirely frank with the committee in giving the substance of this testimony. I am using the incident to show you how frequently the statements of the principal critic are, in fact, misstatements.

(c) RETURN OF CASES TO COURT FOR RECONSIDERATION OR CORRECTION. RECOGNITION AND APPROVAL OF THE POWER.

The power to send a case back to the court for revision, reconsideration, or correction has been recognized as existing independently of express statute from early times.

In 1842 Attorney General Legare advised President Tyler as follows:

In military courts-martial the power of the commander by whom they have been convened to direct them, in the event of disapproval, to revise their sentence and reconsider the proceedings, has never been doubted, and is rested solely upon the ground that the sentences of such courts are not to be put in execution until approved by that commander (4 Ops. Atty. Gen., 19).

In 1853 Attorney General Caleb Cushing wrote as follows:

It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revide its proceedings and sentence. * * * The power of ordering a case back to a court-martial for revision must be conceded as indubitably existing both as to the Army and the Navy of the United States. Its apparent singularity arises from the want of careful scrutiny of the thing done, and of the nature of a court-martial in its relation to the confirming power. (6 Ops. Atty. Gen., 200, 203-204.)

Such was the state of opinion when the Supreme Court of the United States had occasion to pass upon the subject in 1879. A paymaster's clerk of the Navy, named Reed, was tried by court-martial for certain malfeasance in his official duties, found guilty, and sentenced. The revising authority, Rear Admiral Nichols, returned the case to the court with the statement that the finding was in accordance with the evidence, but that he considered the sentence inadequate. Thereupon the court reconsidered the sentence, revoked it, and substituted another and severer punishment, which the revising authority approved. Reed then sued out a writ of habeas corpus in the United States Circuit Court, which court, after a hearing, discharged the writ and remanded the prisoner. Thereupon Reed peti-

tioned the Supreme Court of the United States for writs of habeas corpus and certiorari. In both courts Reed attacked the validity of the court-martial proceedings on the grounds, first, that he as a paymaster's clerk was not amenable to trial by court-martial; and, second, *that the last sentence of the court-martial was void. Upon the latter point it was urged before the Supreme Court that Rear Admiral Nichols had no lawful authority for doing what was done; that at most he was authorized to direct the court to reconsider its sentence only for the purpose of correcting a mistake in matters of law or fact, whereas he had directed a reconsideration of the court's judgment within the limits of its discretion; that when the court passed its first sentence and forwarded the record it exhausted its powers and ceased to exist; and that Reed had been twice put in peril for the same offense and deprived of his liberty without due process of law in violation of the constitutional guarantee.* The Supreme Court, after holding that a paymaster's clerk was within the jurisdiction of the court-martial, held that the revising authority's return of the record and the court-martial's subsequent action thereon were valid and legal acts. The syllabus of the case states the court's ruling as follows:

Where, pursuant to such (Navy) regulations, a general court-martial is duly ordered, the officer clothed with the revising authority may, before it is dissolved, direct it to reconsider its proceedings and sentence; and if it, upon being reconvened, renders a sentence which he approves, such sentence can not be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority.

A., the clerk of a paymaster in the Navy, was, by a court-martial, found guilty of certain charges and specifications of malfeasance in the discharge of his official duties. Sentence was passed upon him, and transmitted, with the record, to the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon A. a severer punishment. A., who was imprisoned pursuant thereto, alleging that it was illegal and void, and that he was thereby unlawfully deprived of his liberty, prayed for a writ of habeas corpus. *Held*, that the court-martial had jurisdiction of the person and of the subject matter, and was competent to pass the sentence whereof A. complained. (Ex parte Reed, 100 U. S., 13.)

In 1893 the Court of Claims considered the validity of a sentence passed by a court-martial upon Gen. Swaim. In 1884 Gen. Swaim had been charged with conduct unbecoming an officer and a gentleman, in connection with certain alleged frauds. He was tried by a court-martial appointed by the President, acquitted of the specific charge, but found guilty of conduct prejudicial to good order and military discipline, and sentenced. The President, the reviewing authority in this case, disapproved the sentence as incommensurate with the offense, and returned the case to the court for reconsideration. The court-martial then imposed another sentence, which President Arthur disapproved as not authorized by law and again returned the record to the court, which imposed a third sentence, severer than the first. The last sentence was approved by the President and carried into effect. Six years afterwards its validity was attacked by Gen. Swaim in an action to recover his forfeited pay in the Court of Claims. The syllabus of the case in the Court of Claims contains the following upon the subject of reconsideration by courts-martial on return of the record by the reviewing officer:

The Army regulation, 1881, No. 923, authorizes the reviewing officer to reconvene a court so that it may correct or modify its conclusions, but does not authorize him to interfere with the proper discretion of the court.

Where the President disapproved of a sentence which was withiu the discretion of the court, on the ground that it was incommensurate with the offense, the case comes within the decision of the Supreme Court in ex parte Reed (100 U. S. R., 13) that the reviewing officer did not thereby require the court to impose a more severe sentence.

Speaking of the return of cases to courts-martial for reconsideration and of the legality of the reviewing officer's action in suggesting to the court the inadequacy of its sentence, the Court of Claims in the opinion in this case by Justice Nott, which later received the expressed approval of the Supreme Court, said:

The question presented by the case it believed to be a new one, unless it be identical in legal effect with that which was before the Supreme Court in ex parte Reed (100 U. S. R., 13). In that case there was an unequivocal offense involving no discretion on the part of the court, viz, "malfeasance in the discharge of his official duty." In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offense; and, if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court; in both cases the reviewing officer disapproved the leniency of the sentence; and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand, it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom; and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law.

But while the last principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in ex parte Reed is conclusive upon this branch of the case. (Swain *v.* U. S., 28 Ct. Cls., 173, 235.)

The Swaim case was appealed from the Court of Claims to the United States Supreme Court, which affirmed the decision at the October term, 1896. The syllabus of the Supreme Court decision states:

The action of the President in twice returning the proceedings of the court-martial, urging a more severe sentence, was authorized by law; and a sentence made after such action, and in consequence of it, was valid.

In the opinion of the Supreme Court delivered by Mr. Justice Shiras the claim that the reviewing officer was without authority in returning the proceedings to the court-martial and that his action in urging greater severity invalidated the sentence of the court, was noticed and commented upon as follows:

It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. * * * In ex parte Reed (100 U. S., 13) a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the record to Admiral Nichols, the reviewing officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of habeas corpus in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct

it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

This court held that such regulations have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial; that the second sentence was not void; and, accordingly, the application for a writ of habeas corpus was denied. We agree with the Court of Claims that the ruling in ex parte Reed, in principle, decides the present question.—(Swiam *v.* U. S., 165 U. S., 553, 534-535.)

X. Courts-Martial in Gen. Ansell's Command While He Was a Company Commander.

In his testimony before this subcommittee Gen. Ansell further states:

I commanded a company from the time I left the Military Academy for three years and then for two years more; and many of these generals had done no more, and many less; and I congratulate myself that I commanded it without a resort to courts-martial, *even summary courts, except in the rarest instances* (p. 121). (Italics supplied.)

Answer.—Let the record speak. I insert a memorandum from The Adjutant General of the Army.

For the Judge Advocate General of the Army:

The records of this office show that Lieut. S. T. Ansell was in command of Company A, Eleventh United States Infantry, on June 23 and 24, 1899; of Company D, same regiment, from some time in November or December, 1899 (actual date not shown) to May 22, 1900; of Company M, same regiment, from September 19, 1900, to October 9, 1900; of Company I, same regiment, from October 27, 1900, to September 14, 1901; of part of Company K, same regiment (in an expedition against insurgents in Southern Samar), from September 29, 1901, to October 6, 1901, and from October 18, 1901, to October 25, 1901; of Company K, from March 18, 1905, to April 8, 1905, and May 7 to May 13, 1905, and from June 28, 1905, to August 4, 1905; of Company D, from August 14, 1905, to April 30, 1906.

During the periods specified above courts-martial for 128 members of the several companies commanded by Lieut. Ansell are shown as follows:

Summary Courts-Martial (128).

Sergt. Joseph L. Anthony, fined $2. November 13, 1899, and $5 December 12, 1899.
Corpl. James B. Logan, fined $2, December 2, 1899.
Pvt. Thomas Behan, fined $1 November 14, 1899, and $8 December 14, 1899.
Pvt. Robert F. Clifford, fined $5 December 14, 1899.
Pvt. William Cocroft, fined $10 November 29, 1899.
Pvt. Frank Donnelly, fined $14, December 11, 1899.
Pvt. Robert J. Doyle, fined $5, December 11, 1899.
Pvt. George Harrison, fined $5, November 13, 1899.
Pvt. William J. Henry, fined $1, November 27, 1899.
Pvt. John J. Hollywood, fined $4, December 11, 1899.
Pvt. Adam Kuster, fined $1 November 11, and $5 December 11, 1899, $2 December 20, and $3 December 26, 1899.
Pvt. Hezekiah L. Medley, fined $3 December 4, 1899, $9 December 9, 1899, and $2 December 14, 1899.
Pvt. William E. Short, fined $10 December 6, 1899.
Pvt. John T. Smith, fined $5 December 12; $5 December 29, 1899.
Pvt. Leopold Strait, fined $5 November 13, 1899.
Pvt. James R. Whittington, fined $3 December 11, 1899.
Pvt. P. S. Childress, fined $3 January 9, 1900.
Pvt. Frank Donnelly, fined $2 January 15, 1900.
Pvt. Emil Henson, fined $12 February 7, 1900.
Pvt. George Harrison, fined $6 February 2, and $15 February 15, 1900.

Pvt. Adam Kuster, fined $8 January 20; $13 February 26, 1900.
Pvt. James B. Logan, fined $3 January 2; reduced to private from corporal February 21, 1900.
Pvt. Maurice Moroney, fined $9 January 23; $8 February 8; $15 February 20; $14.50 February 21; $12 and one month's confinement February 23, 1900.
Pvt. Frank Phipps, fined $5 and reduced to private from corporal, January 15.
Pvt. Frank Smith, fined $3 January 4, 1900.
Pvt. U. G. Blake, fined $5 April 20, 1900.
Pvt. George Kerslake, guilty, no penalty, April 2, 1900.
Pvt. Joseph L. Anthony, fined $5 March 15, 1900.
Pvt. Thomas Behan, fined $5 March 15; $7.50 March 18, 1900.
Pvt. P. S. Childress, fined $2 April 6, 1900.
Pvt. William Cookley, fined $5 and 10 days, March 18, 1900.
Pvt. George Harrison, fined one month's pay March 18, and $10 April 21, 1900.
Pvt. William J. Henry, fined $2 March 7, 1900.
Pvt. John L. Johnson, fined $5 April 19, 1900.
Pvt. David W. Madigon, fined $2 March 15, 1900.
Pvt. Frank Phipps, fined $3 April 9, 1900.
Pvt. John T. Smith, fined $2.50 March 7, 1900.
Pvt. Joseph L. Anthony, fined $3 May 19, 1900.
Pvt. Emil Hanson, fined $5 May 22, 1900.
Pvt. George Harrison, fined $5 May 22, 1900.
Pvt. William Peterson, fined $2 May 10, 1900.
Pvt. Daniel Sheehan, fined $1 May 10, 1900.
Pvt. John T. Smith, fined $5 May 10, 1900.
Pvt. William Cocroft, fined $3 October 4, 1900.
Pvt. William Crocry, fined $1 September 24, 1900.
Pvt. John P. McFadden, fined $7.50 September 20, 1900.
Pvt. Charles J. Ruth, fined $3 October 8, 1900.
Pvt. Leland D. Tompkins, fined $2 October 8, 1900.
Pvt. William J. Elwood, fined $2 December 10, 1900.
Pvt. Floyd H. Miller, fined $1 December 28, 1900.
Pvt. Jacob Stern, fined $4 November 8; $5 December 10, 1900.
Pvt. Clay A. Walker, 20 days' confinement December 29; no fine (1900.)
Pvt. John J. Maher, $1 November 5; $10 November 23; $2 December 8, 1900.
Pvt. Arthur Armstrong, fined 50 cents January 9, 1901.
Pvt. George Burk, fined $10 and 10 days, February 26, 1901.
Pvt. Albert J. Faulk, fined $1 February 13; $2 February 20, 1901.
Pvt. John M. Grayson, fined $5 January 18, 1901.
Pvt. John Kay, fined 50 cents January 10, 1901.
Pvt. Thomas H. Losey, fined $5 and 10 days January 3, 1901.
Pvt. Corry I. Lowry, fined $1 February 13; $5 February 19, 1901.
Pvt. Norman McPherson, fined 1 month's pay and confinement, February 8, 1901.
Pvt. Albert Middleton, fined 50 cents January 15; $1 January 17, 1901.
Pvt. Floyd H. Miller, fined $2 January 24, 1901; $1 December 28, 1900; $10 February 8, 1901.
Pvt. Wm. J. Murray, fined $2 February 7, 1901.
Pvt. John Murphy, fined $5 February 18, 1901.
Pvt. Charles Rollins, fined 50 cents January 9, 1901.
Pvt. Leonard Topp, fined $2 January 9; $2 February 17, 1901.
Pvt. Robert Trusty, fined 50 cents January 9, 1901.
Pvt. Walter Veasey, fined $5 February 8, 1901.
Pvt. Bert Baker, fined $10 March 16, 1901.
Pvt. Thomas H. Losey, fined $7 March 2, 1901.
Pvt. Arthur Macpherson, fined $10 March 12, 1901.
Pvt. Dennis F. Maroney, fined $5 April 23, 1901.
Pvt. Floyd H. Miller, fined $5 and 5 days March 12, 1901.
Pvt. George Riggins, fined $3 April 25, 1901.
Pvt. Jacob Stern, fined $10 and 10 days March 8, 1901.
Pvt. James T. Todd, fined $10 and 20 days March 8, 1901.
Pvt. James Craig, fined $3 February 8, 1901.
Pvt. William D. Coss, fined $10 May 9, 1901.
Pvt. Patrick Hassen, fined $2 June 15, 1901.
Pvt. Patrick McCarthy, fined $10 May 20; $5 May 23, 1901.
Pvt. Daniel J. McCullough, fined $2 June 15, 1901.
Pvt. Harry Moreland, fined $10 June 8, 1901.

Pvt. George Riggins, fined $10 June 3, 1901.
Pvt. Alden K. Riley, fined $10 May 17, 1901.
Pvt. Guy C. Stalmaker, fined $10 May , 3, 1901.
Pvt. Jacob Stern, fined $2 June 15, 1901.
Pvt. Frank Alton, fined $5 May 19; 3 months' confinement August 13, 1901.
Pvt. Charles Carlin, fined $10 and reduced to private from corporal July 22, 1901.
Pvt. William J. Elwood, fined $3 August 8; $1 August 25, 1901.
Pvt. Patrick Hassen, fined $10 July 2, 1901.
Pvt. Corry I. Lowry, fined 1 month's pay July 2, and $3 July 15, 1901.
Pvt. Arthur R. Middleton, fined $3 July 17, 1901.
Pvt. Ezra C. Peck, fined $10 per month for 2 months August 28, 1901.
Pvt. Joseph W. Perkins, fined $10 per month for 3 months August 25, 1901.
Pvt. Adam Sinning, fined $1 August 25, 1901.
Pvt. Lon B. Brewster, fined $1 September 4, 1901.
Pvt. Hugh Gallagher, fined $2 March 18, 1905.
Pvt. Michael Garvey, fined $4.50 May 12, 1905.
Pvt. Robert G. Dudley, fined $1 May 12, 1905.
Pvt. Joseph A. Flanagan, fined $1 May 10, 1905.
Pvt. William T. Munsey, fined $4 May 10, 1905.
Pvt. Ferdinand Rubach, fined $1.50 May 10, 1905.
Pvt. Dan Whitledge, fined $1 May 10, 1905.
Pvt. Howard W. Thomas, fined $6 May 12, 1905
Corpl. Kyle Housel, fined $8 August 27, 1905.
Pvt. Edward L. Johnson, fined $8 August 27, 1905.
Pvt. Boyd Bible, fined $5 September 7, 1905.
Pvt. George L. Fox, fined $1 September 7, 1905.
Pvt. Allen B. Murray, fined $2 September 20, 1905.
Pvt. Richard Sommerfield, fined $10 September 11; $12 September 25, 1905.
Pvt. Guy Swallow, fined $20 November 29, 1905.
Pvt. Edward L. Johnson, fined 1 month's pay and 1 month's confinement December 15, 1905.
Pvt. Oscar R. Milber, fined $5 December 9, 1905.
Pvt. John Monahan, fined 2 month's pay, 3 month's confinement; reduced to private from sergeant November 14, 1905.
Pvt. Theodore Plunkett, fined $5 November 19, $6 December 11, 1905.
Pvt. Richard Sommerfield, fined $10 November 20, $10 December 11, 1905.
Pvt. Frank J. Stockdale, fined $5 December 16, 1905.
Pvt. Eli Kerr, fined 1 month's pay December 15, 1905.
Pvt. Jacob Dern, fined 1 month's pay and reduced from sergeant to private January 31, 1906.
Pvt. William J. Ellis, fined $5 February 23, 1906.
Pvt. Dell S. Hart, fined $1 February 23, 1906.
Pvt. Frank Lawson, fined $10 January 19, $7 February 7, 1906.
Pvt. Frank E. Putnam, fined $8 January 20, 1906.
Pvt. Morgan Condon, fined $4 April 24, 1906.
Pvt. John J. Devine, fined $12 and 30 days' confinement April 25, 1906.
Pvt. Joshua D. Gray, fined $4 April 24, 1906.
Pvt. Arthur Hansen, fined $1 March 20, 1906.

General Courts-Martial (10).

Pvt. John Dickson, fined $10 per month for 3 months and confined for same period (par. 2), Special Orders, No. 254, Department of Porto Rico, 1899.

Pvt. Edward Fairchild, fined $15 per month for 3 months and confined for same period; also reduced from corporal to private (par. 12), Special Orders, No. 25, Department of Porto Rico, 1900.

Pvt. John Doyle, dishonorably discharged January 4, 1900 (par. 6), Special Orders, No. 260, Department of Porto Rico, 1899.

Pvt. Thomas Sweeney, dishonorably dicharged January 5, 1900 (par. 6), Special Orders, No. 263, Department of Porto Rico, 1899.

Pvt. Robert F. Clifford, dishonorably discharged February 4, 1900 (par. 5), Special Orders, No. 25, Department of Porto Rico, 1900.

Pvt. George Lester, dishonorably discharged April 11, 1900 (par. 12), Special Orders, No. 72, Department of Porto Rico, 1900.

Pvt. Frank Donnelly, dishonorably discharged April 12, 1900 (par. 3), Special Orders, No. 77, Department of Porto Rico, 1900.

Pvt. George N. Terwilliger, dishonorably discharged April 20, 1900 (par. 4), Special Orders, No. 83, Department of Porto Rico, 1900.

Pvt. Harry J. Dickerman, dishonorably discharged November 2, 1905, Special Orders, No. 217, Department of Missouri, October 21, 1905.

Pvt. William A. Barber, fined $10 January 5, 1906, Special Orders, No. 4, Department of Missouri, 1906.

P. C. HARRIS,
The Adjutant General.

OCTOBER 6, 1919.

It is fair to state that such investigation as it has been possible to make (necessarily complicated and incomplete) indicates that the number of trials in the company commanded by Lieut. Ansell is below the average of other companies of Infantry for the same period; but the statement that he resorted to courts-martial, even to summary courts, only in the rarest instances, is not justified. In view of the small punishment inflicted in many of the cases, it would seem that the infractions could have been made the subject of company discipline.